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No. [redacted] 38

Supreme Court of the United States

OCTOBER TERM, 1964

RECORD NOT PRINTED

Alfred D. Rosenblatt,
Petitioner

v.

Frank P. Baer

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted
NIGHSWANDER, LORD & BOWNES
Conrad E. Snow, Associate
Attorneys for the Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

Alfred D. Rosenblatt,
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v.

Frank P. Baer

PETITION FOR WRIT OF CERTIORARI

NOW comes the petitioner in the above entitled action and respectfully petitions for a writ of certiorari, making the following representations, as required by Rule 23:

(A) REFERENCE:

Frank P. Baer v. Alfred D. Rosenblatt, Case No. 5211 in the Supreme Court of the State of New Hampshire. Copy of the Court's opinion is appended to this petition.

(B) CONCISE STATEMENT:

(I) Date of judgment sought to be reviewed: October 6,1964, "Judgment on the verdict".

(II) Date of order respecting rehearing: October 28, 1964, "Motion for rehearing denied".

(III) Statutory provision conferring jurisdiction: 28 U. S. C. s 1257 (3), "Final judgments or

decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court - - - (3) by writ of certiorari - - - where any title, right, privilege or immunity is specially set up or claimed under the Constitution - - - ".

(C) QUESTIONS PRESENTED FOR REVIEW:

(1) Whether a decision of the Supreme Court of New Hampshire, sustaining rulings and charge of a Trial Court which refused to grant the defense of privileged criticism to the defendant in a libel brought by a former public official for an alleged defamatory falsehood relating to his official conduct, is in violation of the First and Fourteenth Amendments to the Constitution of the United States of America;

(2) Whether a decision of the Supreme Court of New Hampshire holding that, in a libel suit brought by a former public official for an alleged defamatory falsehood relating to his official conduct, there was evidence of malice before the Trial Court which justified the submission of the issue of malice to the jury, is in violation of the First and Fourteenth Amendments to the Constitution of the United States.

(D) CONSTITUTIONAL PROVISIONS INVOLVED:

The First and Fourteenth Amendments of the Constitution of the United States, as applied in New York Times Company v. Sullivan, 84 S. Ct. 710 (March 9, 1964).

(E) CONCISE STATEMENT OF THE CASE:

On April 15, 1950, the Belknap County Commissioners who had the legal control of the Belknap Recreational Area at Gilford, New Hampshire, hired the plaintiff, Frank (Fritzie) P. Baer, as supervisor of the area. Their written agreement provided that Frank P. Baer will "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (par. 5); "transmit all funds accruing from said recreational area to said county commissioners" (par. 6); "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same" (par. 7).

Under a renewed agreement, dated November 27, 1953, containing the above provisions, plaintiff continued as such supervisor until he was advised on June 23, 1959, that the county commissioners were exercising their right to terminate their contract effective July 10, 1959.

As of September 15, 1959, by virtue of Laws of N. H. 1959, c. 399, the operation of this area was placed in a commission of five members. Dana S. Beane, Jr. was its first chairman. In November, 1959, the commission hired Warren Warner as manager of the area.

Since 1958, the defendant, a merchant in Laconia, had regularly contributed a daily unpaid column in the Laconia Evening Citizen which was entitled "Out of My Head". Some of these articles, starting with one published on December 11, 1958, referred to the plaintiff in conjunction

with the Belknap Recreational Area.

Defendant's column, which is the basis of this action, was published January 29, 1960, when the plaintiff was no longer connected with the area. It read in part as follows:

> "Been doing a little listening and checking at Belknap Recreational Area and am thunderstruck by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:
>
> "What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results."

On March 9, 1960, the plaintiff instituted this action of libel alleging that the above article could be and was understood to mean "that the difference in the net cash results of the income of said Area was due because the plaintiff had committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use," and that "said false, scandalous,

malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule."

The case was tried by jury in April, 1963, and a verdict returned on April 17, 1963, for the plaintiff in the sum of $31,500.

During the course of the trial the defendant claimed that the operation of the Belknap Mountain Recreation Area was a matter of public concern, and that, consequently, his article was privileged in the public interest. The Trial Court early in the trial determined that the operation of the Area was a matter of public concern. He told counsel in chambers:

"Before you say anything, I am going to say that I am going to rule at the appropriate time, based on what I've heard now, that the general subject matter was a legitimate matter of public concern which would give Mr. Rosenblatt the opportunity to raise the defense of privilege." Record P. 8.

This ruling was not, however, communicated to the jury, and the Court, subject to exception, refused to charge the jury that "The administration of the Belknap Area was a matter of public concern, and the criticism of its management by the plaintiff and the County Commissioners is privileged, even if defamatory, if said criticism is not malicious." Instead, the Court left to the jury the question whether the defendant had shown a "lawful occasion" for publishing the defamatory material.

The defendant further claimed that the plaintiff had produced no evidence of malice but the

Court, subject to exception, left the entire issue of malice to the jury.

(F) MANNER IN WHICH FEDERAL QUESTION WAS RAISED:

The federal question sought to be reviewed was not raised in the Trial Court, but was raised, after the decision in New York Times Company v. Sullivan, supra, in the defendant's brief filed with the Supreme Court of New Hampshire on April 30, 1964, in the following words:

"The Court's Charge and the Resulting Verdict are Violations of the First and Fourteenth Amendments to the United States Constitution."

"The verdict of $31,500.00 against the defendant, brought about by the failure of the Trial Court to grant defendant's motions for nonsuit and for directed verdict on the grounds of privilege, his failure to direct the jury that defendant's published criticism was a matter of public concern, and that defendant was entitled to the defense of privileged criticism, his leaving to the jury the issue of malice of which there was no evidence, and his placing the burden on the defendant to prove the truth of his criticism, was a violation of the First and Fourteenth Amendments of the United States Constitution."

The brief went on to quote, in extenso, New York Times Company v. Sullivan.

The Supreme Court of New Hampshire passed upon defendant's contention in the following words:

"We consider next the following argument of the defendant as stated in his brief quoting the above from defendant's brief]. Reliance for this position is placed on New York Times Company v. Sullivan, 84 S. Ct. 710 (1964).

"The Times case was an action for libel brought by one of three elected commissioners of the city of Montgomery, Alabama, as a result of a Times 'editorial' advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of certain negro movements. A verdict of $500,000 was returned for the plaintiff. 'Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring (him), into public contempt . . . Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars . . . Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight . . . Unless he (defendant) can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury." New York Times Company v. Sullivan, supra, 719.

"The court held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that 'prohibits a public

official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id., 726. This rule 'delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.' Id., 727.

"Under New Hampshire law even if there is a libel per se defendant need not prove the truth of the stated facts to escape liability. He may escape liability if he proves a privilege by showing that the facts (although untrue) were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of their truth. Chagnon v. Union-Leader Co., 103 N. H. 426, 438. 'This is a very different thing from showing the actual truth.' Carpenter v. Bailey, 53 N. H. 590, 594. It has long been our law that good motives and belief in truth are strong circumstances to rebut any inference of malice. State v. Burnham, 9 N. H. 34, 44. Carpenter v. Bailey, supra.

"Under New Hampshire law, unlike the Alabama law which prevailed in the Times case, even if the defendant in an action based on a libel per se cannot prove the truth or substantial truth of what was published, there can be no recovery if the defendant establishes the defense of privilege and it is not rendered

inoperative by his actual malice which is not to be presumed but proved by the plaintiff. Lafferty v. Houlihan, 81 N. H. 67; Hutchins v. Page, 75 N. H. 215. Furthermore, our cases require that a plaintiff, be he a public official or not, must prove by a preponderance of the evidence that the libelous statements were defamatory of him and also the extent of the damage which they caused. Chagnon v. Union Leader Co., 103 N. H. 426, 436. Our law also demands that all plaintiffs prove that the defamatory publication applied to them. We do not subscribe to the proposition rejected in the Times case that 'an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.' New York Times Company v. Sullivan, 84 S. Ct. 710, 732.

"The Trial Court correctly charged the jury on all these applicable principles of law. The instructions did not require the defendant to prove the truth of a privileged communication if it was made with good motives and reasonable belief of its truth. We have ruled that the record contained sufficient evidence to warrant a finding that the plaintiff has sustained his burden of proving actual malice by the defendant. We find no conflict with the Times decision."

(H) ARGUMENT:

It is submitted that the New Hampshire Court has decided a federal question of substance in a manner not in accordance with the decision of

the United States in New York Times Co. v. Sullivan, with the result that the defendant has been subjected to an unjust, illegal and unconstitutional judgment of $31,500.00.

It was the defendant's contention at the trial of the case, and before the Supreme Court of New Hampshire, that the manner of the operation of the Belknap Mountain Recreation Area, an institution owned and operated by Belknap County, by the plaintiff as manager for the County Commissioners, was a matter of public concern (and the Trial Judge so ruled in chambers), and that the defendant's comment on the apparent discrepancy between the cash receipts under plaintiff's management and those under a new and succeeding management by an independent commission, and his inquiry, "What happened to all the money last year? and every other year?" was privileged in the public interest. Defendant duly moved for a nonsuit on these grounds, and that being denied, duly requested instructions to the jury to this effect and excepted to the Court's refusal to so charge. The plaintiff claimed that any privilege the defendant might have was negatived by malice, to which the defendant replied that the plaintiff had produced no evidence of malice. The Court, subject to defendant's exception, let the issue of malice go to the jury. All of the issues raised by the failure of the Court to make a specific ruling that the portion of the article complained of was a matter of public concern, the failure of the Court to charge the jury that the defendant's article was privileged in the

public interest, in the absence of malice, and the failure of the Court to withdraw the issue of malice from the jury as requested, were duly protected by exception, reserved for the Supreme Court, and argued in defendant's brief.

In March, 1964, while defendant's brief was in preparation, the Supreme Court handed down the decision in New York Times Co. v. Sullivan. It then became apparent that defendant had an additional defense. As the New Hampshire Supreme Court recognizes in its opinion, the Supreme Court of the United States there held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not;" and also held that proof to show actual malice must have the "convincing clarity which the constitutional standard demands." This decision was obviously a constitutional approach to the same objective which the defendant had sought from the beginning of the trial, - - - protection through his privilege, because of the public interest. The plaintiff had been a public official (in fact, he was a candidate for reappointment) who was seeking damages for an allegedly defamatory falsehood relating to his official conduct. This being so, he should not have been allowed to recover unless the plaintiff produced evidence of "actual malice" on the part of the defendant.

The Supreme Court of New Hampshire has evaded the ruling of the United States Supreme Court in two ways.

First, it has produced a definition of malice which in effect makes all libel malicious. In its opinion the Court sustained a charge of the Trial Court which defined malice as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others. Malice - - - may consist of the intentional publication of defamatory matters with a reckless disregard of the rights of others, and it may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another, regardless of the consequences, even though there is no intention to hurt or harm an individual." Since the publication of a libel must always be intentional, and since the matter, being defamatory must necessarily be liable to injure another, to the publisher's knowledge, and since it is published, "regardless of consequences," it follows under the Court's definition that the publication may always be found to be malicious, even though there was no intention to hurt or harm anybody. It is submitted that this definition of malice entirely subverts the decision of the Supreme Court of the United States which requires "actual malice" in the case of a public official seeking damages for a defamatory falsehood relating to his official conduct.

Secondly, the Supreme Court of New Hampshire sets up certain matters as constituting evi-

dence of malice, but which defendant submits lack the "convincing clarity which the constitutional standard demands". In outline, the Supreme Court of New Hampshire holds that the following is evidence of malice in the instant case:

1) Absence of probable cause in the sources of information given by the defendant as the basis for his statements;

2) That in another article defendant asked a series of questions about the operation of the Area, and insisted on an answer from the County Commissioners or the plaintiff;

3) That in two other articles defendant wrote that the Area was "an antique relic run for the benefit of one family," and commented on the fact that plaintiff had a "substantial portion of his own family on the County payroll," - - - to which he added "nepotism hardly best kind public policy." In fact, the plaintiff's wife, son and daughter-in-law did work at the Area;

4) The alleged defamatory question asked by the defendant which is the basis of the action itself.

The Court said: "Any or all of the statements in these articles could be considered by the jury in their determination of whether the defendant was actuated by malice." None of the evidence meets the constitutional standard with convincing clarity.

In the consideration of this issue it will be necessary for the Court to have before it the transcript of the evidence in the case, and in particular the text of defendant's articles referring to plaintiff, which are printed in the appendix to the defendant's brief.

(I) COPY OF OPINION DELIVERED BY SUPREME COURT OF NEW HAMPSHIRE. (appended)

(J) JUDGMENT OF SUPREME COURT OF NEW HAMPSHIRE:

"Judgment on the verdict."

Alfred D. Rosenblatt, Petitioner

NIGHSWANDER, LORD & BOWNES
Conrad E. Snow, Associate

By: Conrad E. Snow .....
His Attorneys

Appendix

OPINION OF SUPREME COURT OF NEW HAMPSHIRE

Belknap,
No. 5211.

FRANK P. BAER v. ALFRED D. ROSENBLATT

Argued June 2, 1964.

Decided October 6, 1964.

Action for libel of the plaintiff by the defendant in an article written by him and published in the Laconia Evening Citizen on January 29, 1960.

Trial by jury resulted in a verdict for the plaintiff in the amount of $31,500.

Certain exceptions of the defendant were reserved and transferred by Grant, J.

Doherty & Dyer and McLane, Carleton, Graf, Greene & Brown (Mr. Stanley M. Brown orally), for the plaintiff.

Nighswander, Lord & Bownes and Conrad E. Snow (Mr. Hugh H. Bownes orally), for the defendant.

LAMPRON, J. On April 15, 1950, the Belknap county commissioners who had the legal control of the Belknap Recreational Area at Gilford, hired the plaintiff, Frank (Fritzie) P. Baer, as supervisor of the area. Their written agreement provided that Frank P. Baer will "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (par. 5); "transmit all funds accruing from said recreational area to said county commissioners" (par. 6); "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same" (par. 7).

Under a renewed agreement, dated November 27, 1953, containing the above provisions, plaintiff continued as such supervisor until he was advised on June 23, 1959, that the county commissioners were exercising their right to terminate their contract effective July 10, 1959.

As of September 15, 1959, by virtue of Laws 1959, c. 399, the operation of this area was placed in a commission of five members. Dana S. Beane, Jr. was its first chairman. In November, 1959, the commission hired Warren Warner as manager of the area.

Since 1958, the defendant, a merchant in Laconia, regularly contributed a daily unpaid column in the Laconia Evening Citizen which was entitled "Out of My Head." Some of these articles, starting with one published on December 11, 1958, referred to the plaintiff in conjunction with the Belknap Recreational Area.

Defendant's column, which is the basis of this action, was published January 29, 1960, when the plaintiff was no longer connected with the area. It read in part as follows:

"Been doing a little listening and checking at Belknap Recreational Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year.

"When consider that last year was excellent snow

year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results."

On March 9, 1960, the plaintiff instituted this action of libel alleging that the above article could be and was understood to mean "that the difference in the net cash results of the income of said Area was due because the plaintiff had committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use," and that "said false, scandalous, malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule."

On March 6, 1963, approximately three years after plaintiff instituted this action, the defendant moved for a change of venue. He based his motion on the fact that he "as a columnist has frequently made forthright, caustic, and barbed remarks about many affairs in the City of Laconia and in Belknap County, including . . . the management past and present of the Belknap County Recreation Area" and that his remarks "have undoubtedly ruffled the feelings of many people in Belknap County and have made him an object of antagonism by many people in Belknap County." "Some people admire his forthright comments . . . and many other people dislike him intensely for the comments." He alleged that for this and other reasons it was probably impossible he would receive a fair and impartial trial in Belknap county.

The Superior Court has authority to change the venue in an action. RSA 507:11; Cocheco R.R. v. Farrington, 26 N.H. 428, 445. A change should be made if

there is probable ground to apprehend that a fair and impartial trial cannot be had in the particular county. Hilliard v. Beattie, 58 N.H. 112. This is a matter within the discretion of the Trial Court whose determination will not be disturbed unless a plain abuse of that discretion is shown. Whitcher v. Association, 77 N.H. 405, 407. The record does not compel a conclusion that there was abuse. State v. Small, 99 N.H. 349, 352.

We agree with the statement in defendant's briet that "It seems clear that the questions of whether or not the plaintiff was within the orbit of the words of the article and whether the article imputed wrong-doing to the plaintiff were properly left for jury determination." As it could be found that the newspaper article complained of was defamatory of the plaintiff and damaging to him, the defendant could properly be found liable unless the publication was justified or excused.

Justification is established if the facts stated are true and are published with a justifiable motive. Hutchins v. Page, 75 N. H. 215; Chagnon v. Union-Leader Co., 103 N. H. 426, 437. There was ample evidence to warrant a finding by the jury that the defamatory statements of facts made in this column were not substantially true and that the comments made thereon were unjustified. Restatement, Torts, s. 582, comment e; Prosser, Torts (2d ed.) s. 96, p. 632.

"Even though a defendant cannot justify the publication because it can be found to be untrue he may excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth." Chagnon v. Union-Leader Co., supra, 438.

Statements of facts and comments based thereon made by the defendant about the management of the Belknap Recreational Area could be found to constitute a lawful occasion and the basis of a privilege. However they would constitute a lawful occasion and a privilege only if they were published in good faith and with a belief, founded on reasonable grounds, of their truth. State v. Burnham, 9 N. H. 34; Lafferty v. Houlihan, 81 N. H. 67, 71. A court, therefore, cannot rule that a communication is privileged in the public interest without assuming the conditions on which it is held to be privileged, namely, that it was made with good motives and upon probable grounds of its truth. Lafferty v. Houlihan, supra, 72. Where, as in this case, the motives of the defendant and his basis for believing his statements to be true were both in controversy, the Trial Court properly denied defendant's motion that it rule before trial that his article, in the absence of malice or bad faith, was privileged in the public interest.

For the same reason the Trial Court properly refused defendant's request that the jury be charged as a matter of law that there was a lawful occasion for the publication of defendant's article. An examination of the Court's charge in its entirety reveals that the jury was properly instructed on these issues.

The law is well established that a defamatory statement made with malice cannot be excused as privileged. Chagnon v. Union-Leader Co., 103 N. H. 426, 438. Also when the element of malice enters into the wrong the rule of damages is different and more liberal. Bixby v. Dunlap, 56 N. H. 456, 462, 463. The burden of proving malice to defeat the defense of privilege as well as to invoke the more liberal rule of damages is on the plaintiff.

Hutchins v. Page, 75 N. H. 215; Saladino v. Gurdy, 80 N. H. 211; 1 Harper & James, Law of Torts, s. 5. 27, p. 455. The Trial Court properly defined malice in its charge to the jury as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others. Malice . . . may consist of the intentional publication of defamatory matters with a reckless disregard of the rights of others, and it may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another, regardless of the consequences, even though there is no actual intention to hurt or harm an individual." Chagnon v. Union-Leader Co., supra; New York Times Company v. Sullivan, 84 S. Ct. 710, 726 (1964).

The defendant stated in part in the article complained of "Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning. This year, a year without snow till very late . . . the difference in cash income simply fantastic, almost unbelievable. On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year. When consider last year was excellent snow year . . . one can only ponder following question: What happened to all the money last year? and every other year?"

Defendant testified that by "literally hundreds of per cent Better" he meant to say that the cash income for "this year" was more than twice but not necessarily more than three times what it was "last year." The jury could find on the evidence that on the figures available when defendant wrote his article there was very little difference in the cash income for the two years compared in defendant's column.

Defendant testified "had I not been told that there was a great difference between that January and the other January, I would probably not have had occasion to write the article." There was evidence from which the jury could find that the sources of information given by the defendant as bases for his statements gave no support for what he wrote. "Probable cause is undoubtedly a circumstance, and a strong one, to rebut any presumption of malice; as the absence of it is evidence to show malice." State v. Burnham, 9 N. H. 34, 44; Shackett v. Bickford, 74 N. H. 57; 1. Harper & James, Law of Torts, s. 5.27, p. 455; 33 Am. Jur., Libel and Slander, s. 266, p. 248.

In an article dated January 9, 1959, defendant asked a series of questions about the operation of the area which he invited the plaintiff or the county commissioners to answer. On January 12, plaintiff's son, who worked at the area, endeavored to answer these questions by a letter to the editor published in the Laconia Evening Citizen and in it he also invited defendant to obtain a copy of all area expenditures and income at the county court house and stated that "I do feel that the best answers to all the people's doubts and questions can best be answered by the County Comm., County delegation members, and Area management at the annual Budget meeting open to all County residents. This meeting is coming up soon." On January 21, defendant published in his column that he had not yet heard from the plaintiff and the commissioners as to these questions. On January 27, defendant's column stated that the plaintiff in a public speech on January 22, said he was not going to answer the questions and defendant asked "why."

In an article published February 14, 1959, the de-

fendant characterized the area as "an antique relic run for benefit of one family and favored few friends." June 25, 1959, after plaintiff's employment had been terminated, defendant wrote "Commishes responsible for hiring and firing of County personnel. That their legal duty and obligation cannot offhand simply assume they did it without reason. Maybe they had darned good reasons. Not fair to jump to conclusions without having asked them. After all Fritzie did have substantial portion of his own family on County payroll. Maybe this good . . . maybe not. Certainly on face of it, nepotism hardly best kind public policy." January 29, 1960, the column which is the basis of this action asked "What happened to all the money last year? and every other year?" The plaintiff was supervisor of the area in charge of income and disbursements during the time inquired about.

Any or all of the statements in these articles could be considered by the jury in their determination of whether the defendant was actuated by malice in publishing the article of January 29, 1960. Saladino v. Gurdy, 80 N. H. 211, 213; II Wigmore, Evidence, ss. 403, 404. We are of the opinion that the jury could find on the evidence that the defendant lacked reasonable grounds to believe in the truth of the statements he published; that by his prior utterances he demonstrated animosity toward the plaintiff; and that the defamatory statements, which are the basis of this action, were published with actual malice and consequently not privileged. Chagnon v. Union-Leader Co. 103 N. H. 426, 440.

We consider next the following argument of the defendant as stated in his brief. "The verdict of $31,500 against the defendant, brought about by the failure of the Trial Court to grant defendant's motions for nonsuit and for directed verdict on the grounds of privilege, his

failure to direct the jury that defendant's published criticism was a matter of public concern, and that defendant was entitled to the defense of privileged criticism, his leaving to the jury the issue of malice of which there is no evidence, and his placing the burden on the defendant to prove the truth of his criticism, was a violation of the First and Fourteenth Amendments of the United States Constitution." Reliance for this position is placed on New York Times Company v. Sullivan, 84 S. Ct. 710 (1964).

The Times case was an action for libel brought by one of three elected commissioners of the city of Montgomery, Alabama, as a result of a Times "editorial" advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of certain negro movements. A verdict of $500,000 was returned for the plaintiff. "Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring (him), into public contempt . . . . Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars . . . . Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight . . . . Unless he (defendant) can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury." New York Times Company v. Sullivan, supra, 719.

The court held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official con-

duct unless he proves that the statement was made with 'actual malice' - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id., 726. This rule "delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Id., 727.

Under New Hampshire law even if there is a libel per se defendant need not prove the truth of the stated facts to escape liability. He may escape liability if he proves a privilege by showing that the facts (although untrue) were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of their truth. Chagnon v. Union-Leader Co., 103 N. H. 426, 438. "This is a very different thing from showing the actual truth." Carpenter v. Bailey, 53 N. H. 590, 594. It has long been our law that good motives and belief in truth are strong circumstances to rebut any inference of malice. State v. Burnham, 9 N. H. 34, 44. Carpenter v. Bailey, supra.

Under New Hampshire law, unlike the Alabama law which prevailed in the Times case, even if the defendant in an action based on a libel per se cannot prove the truth or substantial truth of what was published, there can be no recovery if the defendant establishes the defense of privilege and it is not rendered inoperative by his actual malice which is not to be presumed but proved by the plaintiff. Lafferty v. Houlihan, 81 N. H. 67; Hutchins v. Page, 75 N. H. 215. Furthermore, our cases require that a plaintiff, be he a public official or not, must prove by a preponderance of the evidence that the libelous statements were defamatory of him and also the extent of the damage which they caused. Chagnon v. Union-Leader Co., 103 N. H. 426, 436. Our law also demands

that all plaintiffs prove that the defamatory publication applied to them. We do not subscribe to the proposition rejected in the Times case that "an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." New York Times Company v. Sullivan, 84 S. Ct. 710, 732.

The Trial Court correctly charged the jury on all these applicable principles of law. The instructions did not require the defendant to prove the truth of a privileged communication if it was made with good motives and reasonable belief of its truth. We have ruled that the record contained sufficient evidence to warrant a finding that the plaintiff has sustained his burden of proving actual malice by the defendant. We find no conflict with the Times decision.

Defendant's motion to set aside the verdict as excessive was denied by the Trial Court. We set out in Chagnon v. Union Leader Co., supra, 446 the standard for our action in the circumstances: "The consideration of the defendant's motion involved questions of fact for the Judge and his decision will not be set aside unless no reasonable person would make it . . . . In most jurisdictions the view is taken that the Trial Judge, because of his more favorable position to determine the weight of the evidence and assess all the circumstances involved, may more freely interfere with the verdict than the appellate court and that his decision upon this question will be given great weight in passing upon the question on appeal." We also stated therein that the verdict in this case "must be assayed in the frame work of our rule that 'when the element of malice enters into the wrong a more liberal rule of damages prevails.'" Id.

The evidence showed that the plaintiff's earnings increased from a low of $7,150 in 1954 to about $8,000

in 1958 which was his rate of pay at the area when his employment was terminated effective July 10, 1959. His life expectancy was shown to be 15.44. He was 61 at the time of the trial in 1953. His earnings for 1960 were about $300, for 1961 they were $6,491.82 and $5,994.50 for 1962. From the evidence the jury could find that but for the defendant's libel the plaintiff would probably have secured employment at $8,000 per year in the ski or motorcycle industry or in similar lines of work. He had experience in public relations with the motorcycle industry and in managing a ski area. Consequently the jury could properly find a loss of earning caused by the libel of $7,000 in 1960, about $1,500 in 1961, and $2,000 in 1962 for a total of $10,500.

According to the evidence the effect of the article still continued at the date of the trial in April, 1963. "When Mr. Baer's name was mentioned, this fact of him being fired or let go from the Area came up at the same time." The jury could properly find as the natural and proximate result of the publication probably loss of future earnings for at least four more working years (to age 65), which on previous figures could amount to $6,000 or more. Chagnon v. Union Leader Co., 103 N. H. 426, 441.

When as in this case, the jury could find that the defamatory publication charged the plaintiff with a crime or with activities which would tend to injure him in his trade or business, plaintiff can recover for damages to his reputation resulting therefrom. Id.

Lastly there was evidence from which the jury could find actual malice on the part of the defendant and could award damages for mental distress and vexation which cannot be made the subject of exact pecuniary compensation. Restatement, Torts, s. 623. Also on a finding of malice a different and more liberal rule of damages pre-

vails, that is, the jury is to "endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay." Bixby v. Dunlap, 56 N. H. 456, 464. We cannot say that the jury verdict did not come within that norm or that the Trial Court acted as no reasonable person would in refusing to set the verdict aside. Wisutskie v. Malouin, 88 N. H. 242, 246.

We consider next defendant's argument that the Trial Court should have permitted the introduction of evidence as to the disposition of a libel suit brought by plaintiff's son against the defendant based on the same article. This suit had been marked "Voluntary Nonsuit." The Trial Court instructed the jury that any other lawsuit arising out of this article and the disposition made of it has no bearing on the issues before them and should be disregarded. We see no error in this ruling. SayKaly v. Manchester 97 N. H. 4, 5; Masterson v. Berlin Street Ry, 83 N. H. 190.

Defendant also excepted to the refusal of the Trial Court to admit evidence of the bringing and disposition of a suit brought by the plaintiff against the publisher of the newspaper in which defendant's column appeared. This action was settled for $2,000 on a covenant not to sue. The Court properly excluded this evidence and the amount received should be deducted from the verdict returned in the present action. Masterson v. Berlin Street Ry, supra; Martel v. Wallace 83 N. H. 276, 279; Burke v. Burnham, 97 N. H. 203, 212.

Judgment on the verdict.

KENISON, C. J. concurred in the result; the others concurred.

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JOHN F. DAVIS,

Supreme Court of the United States

No. [redacted] 38

October Term, 1965

ALFRED D. ROSENBLATT
Petitioner

v.

FRANK P. BAER
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of New Hampshire

Respondent's Brief in Opposition

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Supreme Court of the United States

No. 780

October Term, 1964

ALFRED D. ROSENBLATT
Petitioner

v.

FRANK P. BAER
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of New Hampshire

Respondent's Brief in Opposition

Respondent Frank P. Baer, a private citizen of the State of New Hampshire and of the United States, respectfully represents to the Court that the writ of certiorari sought in this case ought not to issue.

PROCEEDINGS BELOW

This is an action for libel and trespass of the respondent Baer, a private citizen, by the petitioner Rosenblatt, also a private citizen, based upon a newspaper article written by Rosenblatt

which respondent claimed to have been false, scandalous, malicious, defamatory and untrue. Trial was by jury in Belknap County Superior Court in April of 1963, resulting in verdict for Baer in amount of $31,500. Motions to set aside were, after hearing, denied by the Superior Court.

On appeal to the Supreme Court of New Hampshire, the cause was argued on June 2, 1964, and decided *sub nomine, Baer* v. *Rosenblatt,* No. 5211, on October 6, 1964, the order being "Judgment on the verdict." Rosenblatt's motion for rehearing was denied on October 28, 1964.

JURISDICTION OF THIS COURT

The writ is sought under 28 U. S. Code 1257 (3), from the above final judgment of the highest court of the State of New Hampshire, on the claim that a right or privilege was specially set up or claimed below under the Constitution of the United States.

QUESTIONS PRESENTED

Petitioner urges that the writ should issue to review his claim that rights or privileges guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States were violated by the decision below.

Respondent contends that the writ ought not to issue, because of the provisions of the Seventh, Ninth, and Tenth Amendments to the Constitution of the United States, which require the United States and this Court to recognize his rights, guaranteed under the New Hampshire Constitution, Part 1, Articles 2, 12, 14, and 20, to a remedy for injury to his character, with the facts to be determined by jury according to the common law.

CONCISE STATEMENT OF THE CASE

The petition to this Court is based solely on the premise that the decision in *New York Times Company* v. *Sullivan,* 845 S Ct 710, (March 9, 1964) is an invitation for losing litigants in libel actions to seek a final factual review in this Court. Respon-

dent's position, that such is not the law and should not be the practice, is set forth in our brief below at pages 40-44.

We have here a libel based upon a 1960 newspaper article which falsely defamed respondent—the last in a series of sporadic attacks starting in 1958. Petitioner, in his brief below, *p.* 7, acknowledged that on the evidence, the issue of identification of the respondent, and whether the article imputed wrong-doing to the respondent were properly left for jury determination. Consequently, petitioner has now admitted (after proof was introduced to the triers of fact who inferentially found these facts) the fact of defamation of this respondent.

There was specific proof of damage resulting to the respondent, substantial and actual. This evidence is briefed by respondent below at *pp.* 14-19 and argued at *pp.* 44-46. The Trial Court refused to set aside on the ground of excessiveness. The Supreme Court of New Hampshire reviewed and affirmed the propriety of the verdict of $31,500, pointing out that specific evidence of special damages alone of $16,500 appears in the record. (See opinion in Petition Appendix, *p.* 25 *et seq.*)

In his brief below petitioner twice admitted, *arguendo,* at pages 24 and 32, that the jury in fact found malice to exist in returning its general verdict.

Thus identification, defamation, damage and a finding of malice by the triers of the fact are all beyond dispute here, and the actual issues presented appear to be limited to the procedural handling of the petitioner's defense of qualified privilege, and whether the record contains evidence of malice sufficient to support the jury verdict. On this limited phase of the case, a brief explanation of the facts may be helpful:

Baer had personally handled nearly $1,000,000 in cash—nickels, dimes, quarters and bills—during his employment as supervisor of the Belknap Recreational Area from 1950 through 1959. He collected the money personally and carried it personally to the bank, as was well known to the community. He was terminated by the County Commissioners in June of 1959 after control of this ski area was taken out of their hands effective in September.

Rosenblatt had been sniping at Baer for a year and a half (see Plaintiff's brief below, *pp.* 7-14) and had raised the innuendo in his column that Baer would be embarrassed to answer questions concerning his handling of public funds while he was still employed. After he was terminated without cause stated, Rosenblatt suggested that there may have been "darned good reasons".

A new Commission took over control of the area in September of 1959 and replaced Baer with a new supervisor, Warner.

On January 28, 1960, Rosenblatt wrote, and published on January 29, that he had been investigating, was thunderstruck at what he had learned: "the difference in cash income simply fantastic, almost unbelievable", that the area was "doing literally hundreds of per cent BETTER than last year". Then, saying weather factors could not explain the difference, he posed the question:

"What happened to all the money last year? and every other year?"

His readers "got the message" loud and clear: like wildfire it was interpreted as indicating that Baer had been stealing the funds. Not only were all of the adults discussing it, its impact was even felt on the playground at the public school where Baer's granddaughter was taunted by other children: "They are calling my grandpa and my daddy a thief. It said so in the paper." (See brief below, *pp.* 14-17.)

Rosenblatt testified that he intended to compare the period in 1959-1960 of Warner's control (September 1959—January 1960) with the same period in the prior year; he also said (trying to change his position) that he had in mind only the ski season within that period. He wrote the piece on January 28, so obviously had access to no information as to cash receipts subsequent to that date. The actual facts were:

In Baer's last year, in the period September through January, he deposited $65,471.17, of which $52,756.00 was operating revenue: in the following year Warner's deposits in the same period were $53,396.00. During the ski season only in Baer's last year through January, Baer's receipts were $49,775.49; Warner's

receipts to January 29, 1960, were $49,932.59. Thus on the facts there was no material change in the cash income being experienced after Warner replaced Baer up to January 29, 1960. The record is replete with evidence that neither on a gross nor on a net basis was there any remarkable change in receipts or profits worthy of public reporting or comment.

There was no factual basis for the writing. The sources Rosenblatt claimed gave him such information denied that they had done so. No such comparative data even existed. It is for this deliberate prevarication that petitioner claims a constitutiinal privilege—defamation published "Out of My Head".

ARGUMENT

This Court in *New York Times, supra,* announced a new rule for the disposition in trial courts of claims for libel brought by public officials (whatever that may mean in individual cases) against critics of their official conduct (whatever that may mean in individual cases). The new requirement for the cases to which *New York Times* applies is merely that the defamatory statement be made "with actual malice—that is, with knowledge that it was false or with a reckless disregard of whether it was false or not".

In announcing this rule, the Court approved "an oft-cited statement of a like rule, which has been adopted by a number of state courts"—including, by reference in footnote 20, the Supreme Court of New Hampshire: "And see *Chagnon* v. *Union Leader Corp.,* 103 N. H. 426, 438, 174 A.2d 825, 833 (1961)". Certiorari was denied in *Chagnon,* 369 U. S. 830, 7 L.ed 795, 82 S Ct 846.

The *Chagnon* rule thus specifically referred to is:

> "Even though a defendant cannot justify the publication because it can be found to be untrue, he may excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in

> good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds of its truth [citations]. However, if a defamatory statement is made with actual malice, it cannot be excused as privileged [citations].
>
> "The Trial Court charged the jury as to what constitutes malice in the following words: 'by malice I mean not only ill will, evil motive or intention to injure but also wanton disregard of the rights of others and the consequences likely to follow'. We are of the opinion that this was a proper statement of the applicable law."

The instant case was handled procedurally with respect to the defense of privilege precisely as was the *Chagnon* case. Consequently, the writ ought not to issue.

Petitioner argues, we think, that under the *New York Times* rule he is entitled to have the trial court rule at the outset of trial and charge as a matter of fact that any false defamatory writing of or concerning a government activity is privileged, leaving as the only issue of fact whether there was actual malice.

We believe, on the contrary, that *New York Times,* read together with the cases cited as illustrative of a similar rule and *Garrison* v. *Louisiana,* U. S. , 13 L.ed (adv) 125, properly leaves with the State courts the procedural problem of whether a "lawful occasion" or a "conditional privilege" is made out *independently of the issue of malice,* and is then destroyed by proof of malice, or whether *absence of malice is a necessary part of establishing the defense of qualified privilege.* Under the New Hampshire rule, since malice is an issue of fact (it is not presumed), once malice is claimed and some evidence of malice is introduced, both issues—malice and privilege—become issues for the trier of the fact under *Chagnon* instructions.

In this case, actual malice was pleaded, actual malice was claimed in opening, and evidence of actual malice was introduced in plaintiff's case. Thus, since plaintiff's evidence was first received, a factual issue on malice was already in the case before evidence was received on which the claim of qualified privilege was based. And unless the Court is to invade the constitutional

province of the jury, under such circumstances both malice and privilege become factual issues. We invite to the Court's attention our discussion of the New Hampshire cases on this point, in our brief below, at pages 25-26.

That the record below contains evidence of actual malice has already been decided, (1) by the Trial Court who submitted the issue to the jury, (2) by the jury to whose determination of the fact respondent is entitled under N. H. CONSTITUTION, Part 1, Article 20 in an action for injury to his character, *Id.* Art. 14, and (3) on review by the Supreme Court of New Hampshire.

We have briefed that evidence below in our brief at *pp.* 29-38. Our Supreme Court refers to the same evidence generally as proof of actual malice. (See opinion in Petition Appendix, *pp.* 19-22.) Whether the test be that of "substantial evidence on the record", "sufficient evidence", or any other test appropriate to a civil case, we submit that the finding, verdict and judgment below are constitutionally sound.

Rosenblatt, in writing and publishing this libel used a calculated falsehood, *at least* with reckless disregard of whether it was true or false, for the malicious purpose of insinuating that Baer was dishonest. We say, on the entire record, including Rosenblatt's own testimony, that the jury was entitled to conclude that his published statements of fact concerning the non-existant but purportedly "fantastic" increase in cash income were *knowingly false* because he made them up himself. They saw him. They heard him knowingly lie to them in efforts to deny his malice. They heard his "sources" deny that they gave him the supporting information which he ascribed to them. They had before them uncontradicted and unimpeached evidence that *no data existed* on January 28 or 29, 1960, that would have suggested such a factual situation. *Thus deliberate prefabrication for the purpose of publishing a provocative defamatory insinuation is an almost compelled finding,* once the jurors decided not to believe Rosenblatt's protestations of honest error. Credibility became the crucial question on the issue of whether this defamation resulted from honest inaccuracy or the use of calculated falsehood, and the issue is foreclosed by the determination of the triers of the fact. The weighing of the evidence was for the jury under the

New Hampshire Constitution, competent evidence having been laid before them. There is no constitutional immunity for such conduct. *Garrison* v. *Louisiana, supra.*

In what we have argued above, we have assumed that this Court's decision in *New York Times* has some application here. In fact, we do not believe this case falls within the area toward which *New York Times* is directed because Baer was not a public official. He was a private citizen at the time of the libel and at the time of instituting the action. He had never been a "public official", his prior position being merely that of an employee of the Belknap County Commissioners (See Brief below, *pp.* 41, 42).

CONCLUSION

It seems abundantly clear to members of the trial bar that under the doctrine of *New York Times* defense counsel henceforth will routinely claim violation of rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States in an effort to get an independent constitutional review of the facts of the case by this Court in all libel cases where privilege is claimed. This is such a petition. The writ ought not to issue.

Respectfully submitted,

DOHERTY & DYER,

McLANE, CARLETON, GRAF, GREENE & BROWN

by STANLEY M. BROWN

Attorneys for Respondent

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Supreme Court of the United States

No. [redacted] 38

OCTOBER TERM 1964

Alfred D. Rosenblatt

Petitioner

v.

Frank P. Baer

Respondent

Petitioner's Reply to Respondent's Brief in Opposition

Supreme Court of the United States

No. 780

October Term 1964

Alfred D. Rosenblatt
Petitioner

v.

Frank P. Baer
Respondent

Petitioner's Reply to
Respondent's Brief in Opposition

Respondent says in his "Concise Statement of the Case" in his Brief in Opposition, page 4-5, that there was no factual basis for petitioner's writing. This states only one view of the evidence.

Petitioner's writing was published January 26, 1960. In it he stated: "on any sort of comparative basis, the Area this year is doing literally hundreds of per cent better than last year." The evidence was undisputed that the receipts of the Belknap Area in January, 1959, were

$22,744.25; and that the cash receipts in January, 1960, were $51,168.81, over two times the receipts of the previous year R.V. p. 73; Ex. W., R. IV, p. 60). Although it may be claimed that the petitioner was exaggerating when he said that this difference in cash income was "simply fantastic, almost unbelievable", it was at best over 200% of the previous years income, and therefore "hundreds of per cent better".

Respondent says that petitioner had no access to information as to receipts subsequent to January 28, that "no such comparative data even existed, and that petitioner's statement was a "deliberate prevarication". As a matter of fact, however, Mr. Warner, the new manager of the Area, and the new Area Commissioners, were actually checking the receipts from day to day, and particularly from week-end to week-end, and making a comparison between receipts in 1959 and receipts in 1960, and Mr. Warner was giving the information to Mr. Beane, Chairman of the Commission (R. III, p. 54). The Commission, and Dana Beane, Jr., Chairman, had financial information that would give them "a comparative basis of daily receipts in total and by department" (R.V. p.31-2). So it is clear on undisputed evidence that the compartive data existed. That the petitioner had access to the information is also clear from his testimony that he talked with Dana Beane on the telephone (presumably, after a meeting on January 26), and that Mr. Beane told him that they were "doing many times better" (R. II, p.118-9, 107). Mr. Beane confirmed that Mr. Rosenblatt called him, "at least once requesting financial and other information concerning the Area" (R. V., p.43-4).

It is, accordingly, clear, on the evidence, that petitioner's statement about the difference between the cash income "this year" and "last year" was based on facts,

of which petitioner had information from authoritative sources, and was not a "deliberate prevarication". This was all set forth in petitioner's brief to the New Hampshire Supreme Court on page 12.

Alfred D. Rosenblatt, Petitioner

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Conrad E. Snow, Associate

By: Conrad E. Snow
His Attorneys

PETITIONER'S BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 38

Alfred D. Rosenblatt

Petitioner

v.

Frank P. Baer

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 38

ALFRED D. ROSENBLATT

Petitioner

vs.

FRANK P. BAER

Respondent

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the New Hampshire Superior Court for Belknap County, in which the case was originally tried, is unreported. The opinion of the New Hampshire Supreme Court, Frank P. Baer v. Alfred D. Rosenblatt, is reported at 106 N.H. 26 (1964). A copy of the court's opinion is printed in the appendix to this brief.

JURISDICTION

The judgment of the New Hampshire Supreme Court, sustaining the verdict of the New Hampshire Superior Court, was entered on October 6, 1964. Petitioner's motion for re-hearing was denied on October 28, 1964. Petition for certiorari was filed in this Court on December 23, 1964, and granted March 15, 1965. In granting certiorari, this Court said: "Counsel are directed in addition to argue the question whether, at the time of respondent's employment as supervisor of the recreation area, he was a 'public official' under the decisions of this court in New York Times Co. v. Sullivan, 376 U.S. 254, and Garrison v. Louisiana, 379 U.S. 64." This Court has jurisdiction under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

(1) Whether a decision of the Supreme Court of New Hampshire, sustaining rulings and charge of a Trial Court which refused to grant the defense of privileged criticism to the defendant in a libel suit brought by a former public official for an alleged defamatory falsehood relating to his official conduct, is in violation of the First and Fourteenth Amendments to the Constitution of the United States of America;

(2) Whether a decision of the Supreme Court of New Hampshire holding that, in a libel suit brought by a former public official for an alleged defamatory falsehood relating to his official conduct, there was evidence of malice before the Trial Court which justified the submission of the issue of malice to the jury, is in violation of the First and Fourteenth Amendments to the Constitution of the United States;

(3) Whether, at the time of respondent's employment as supervisor of the Belknap County Recreational Area, he was a "public official" under the decisions of the

United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, and Garrison v. Louisiana, 379 U.S. 64.

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments of the Constitution of the United States as applied in New York Times Co. v. Sullivan, 376 U.S. 254, and Garrison v. Louisiana, 379 U.S. 64.

STATEMENT OF THE CASE

1. THE FACTS.

A. The Duties Of The Respondent, As Manager Of The Belknap County Recreational Area, And The Public Interest And Concern In The Management And Operation Of The Belknap County Recreational Area.

The respondent had been "manager, director, and supervisor" of the Belknap County Recreational Area, and had handled all its monies and had been "responsible for the direct operation of said Area" from 1950 until his services were terminated on July 10, 1959 (Respondent's declaration; R.I, 204, 210).

The Belknap County Recreational Area is a year round recreation center with the main emphasis on skiing. It was built in the depression years as a WPA project and has always been owned by the people of Belknap County (R. III, 155). Until September 15, 1959, the Area had been operated by the Belknap County Commissioners. The County Commissioners, three in number, are elected every two years at the regular November election by the voters of Belknap County.

The operation and management of the Area had engendered since its inception, and particularly since the end of World War II, a great deal of discussion, controversy, and argument through Belknap County (R.I, 200). The people of Belknap County were interested particularly in the finances of the Area and the way it was being run

(R.I, 155, 156). Articles appeared from time to time in the newspapers circulated in Belknap County, not only discussing its operation, but also comparing its fiscal status on a year to year basis (R.I, 155, 156). Since the Area was publicly owned, everyone who had any connection with it accepted without question the right of the public to know how it was being operated and managed and what its financial situation was (R.I, 156, 200). The County Commissioners acknowledged that the way the Area was run and operated was a matter of public concern and acknowledged that the public had a right to know all about the operation of the Area and its finances (R.I, 155-157, 200; R.III, 117).

Starting a few years after World War II, criticism as to the way the County Commissioners were operating and managing the Area became more frequent and there was more and more public argument and discussion as to whether the Area should be sold to private interests, whether it should be operated at all, and whether or not the County Commissioners should continue to operate the Area. A group of interested citizens had for a long time prior to 1960 felt that the Area should be operated and managed by a five-man Commission entirely divorced from politics (R.I, 200, 201; R.II, 14; R.III, 92).

As a matter of fact, one of the reasons the respondent was hired as manager in 1950 was because of the criticism directed at the County Commissioners for the manner in which they were operating the Area (R.I, 201). At about the same time that the respondent was hired as manager by the County Commissioners, a bill was being drafted which would turn the management of the recreation area over to the Area Commission and take all control of the Area away from the County Commissioners (R.I, 199-202).

The respondent was hired in 1950 and entered into a

contract with the County Commissioners in which he agreed that he would:

> "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (Exhibit 17, Paragraph 5; R.I, 171, 172); "transmit all funds accruing from said recreational area to said County Commissioners at such time and in such manner as they shall from time to time prescribe and that he will transmit all invoices, accounts, bills and statements and other like papers to them" (Exhibit 17, Paragraph 6; R.I, 171, 172); "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same in accordance with such procedure as may be adopted by said Commissioners" (Exhibit 17, Paragraph 7; R.I, 171, 172).

Although the contract in fact gave the respondent all the responsibilities and duties of the manager of the Area, Paragraph 8 provided as follows:

> "It is understood by and between the parties hereto that the said Commissioners are, by law, responsible for managing said recreational area and that said Commissioners do not have the power to delegate said managerial powers to the said Frank P. Baer, and that consequently, the said Frank P. Baer, in the performance of his duties hereunder, shall act subject to the direction and control of said Commissioners, in a supervisory capacity" (Exhibit 17, Paragraph 8; R.I, 171, 172).

However, the County Commissioners surrendered the powers reserved to them under Paragraph 8 and turned them over to the respondent by a letter sent by Commis-

sioner Hubbard, one of the Commissioners, to the respondent at the time the original contract was forwarded (Exhibit 21, R.I, 216). This letter read as follows:

> "You will note that the first part of the contract outlines your duties as manager, and then explains that those duties are by law expressly delegated to the three Commissioners who cannot legally be divorced from them. However, this actually means little, and simply requires a certain amount of faith on your part as well as ours in the future promotion and operation of the Area.
>
> "We Commissioners are eager to turn you loose Fritzie, and you can be assured that our full cooperation will be yours at all times."

In 1953, the office of manager of the Belknap County Recreational Area was made statutory (Laws of New Hampshire, 1953, Ch. 344). The statute provided as follows:

> "The manager of the Belknap County Recreational Area shall be employed by the Commissioners with the approval of the County Convention. Any employment contract entered into between the manager and the County Commissioners shall be signed by the Chairman of the Convention after the same has been approved by the Convention."[1]

The respondent's final contract with the County of Belknap was dated November 27, 1953, and was signed by the County Commissioners and approved by the County Convention under the statute.

Under the terms of this contract, the respondent was

1. The "County Convention" in New Hampshire consists of the representatives to the Legislature elected by the towns of the county and one member from each town which does not have a representative (Revised Statutes of New Hampshire Annotated, Ch. 24, Sec. 1).

employed at an annual salary of $7,150.00 plus all authorized expenses. Paragraphs 5 to 8 of the contract read as follows (Exhibit 17; R.I, 171, 172):

> "5. The said Frank P. Baer agrees that he will, during the term of this contract supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area, that he will supervise the hiring and firing of all persons employed in connection with said recreational area, that he will supervise the arranging and promotion of recreational and other lawful activities at said recreational area, that he will supervise all of the operations at said recreational area, that he will supervise all maintenance work at said recreational area, that he will supervise all purchases relative to the said recreational area, that he will supervise such construction work at said recreational area as said Commissioners may request, and that he will do and perform any and all other acts of supervision as may be requested by said Commissioners."

> "6. The said Frank P. Baer further agrees that he will, during the term of this contract, transmit all funds accruing from said recreational area to said County Commissioners at such time and in such manner as said County Commissioners shall from time to time prescribe, and that he will transmit all invoices, accounts, bills, statements and other like papers to said County Commissioners at such time and in such manner as said County Commissioners may from time to time prescribe."

> "7. The said Frank P. Baer further agrees that he will, during the period of this contract, carefully

examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same in accordance with such procedure as may be adopted by said Commissioners."

"8. It is understood by and between the parties hereto that said Commissioners are by law responsible for managing said recreational area and that said Commissioners do not have the power to delegate said managerial powers to the said Frank P. Baer and that consequently the said Frank P. Baer in the performance of his duties hereunder shall act subject to the direction and control of said Commissioners in a supervisory capacity: it is further understood that said Commissioners shall retain their power relative to hiring and firing personnel, relative to maintenance, relative to purchases, relative to construction work, and relative to finances, and that the said Frank P. Baer in supervising such matters will act subject to the direction and control of said Commissioners."

Despite the express statutory authority for employing a manager, the County Commissioners used the same language in Section 8 of this contract as they had used in the prior contract. Since the whole 1953 contract was copied verbatim from the original contract of 1950, it can be assumed that this was inadvertent.

Public concern with the operation of the Belknap County Recreational Area did not abate after the respondent was hired as manager, but continued and even intensified. The respondent himself took part in public discussions about the best method of operating the Area and advocated publicly taking the ultimate control away from

the County Commissioners (R.I, 209; R.III, 101, 102, 169).

The respondent testified on pre-trial deposition to the following effect: that he considered the operation of the Area a matter of public concern; that he thought the people of Belknap County had a right to know as much about the operation of the Area as possible; that he considered, as manager, he was trustee of public funds; that the voters and taxpayers of the County were entitled to have correct financial information concerning his operation; and he made the following statement as to his ultimate responsibility:

> "As manager of the Belknap County Recreational Area I always said I had 15,000 bosses. I worked directly under the Commissioners, who came under the control and supervision of the County Delegation. So, I was really under 23 or 24 bosses of the County, plus the people in Belknap County." (This testimony was before the New Hampshire Supreme Court via Defendant's Motion to Dismiss, Reserved Case, page 7; R.I, 21, 43).

This public discussion and controversy culminated in the passage of a statute by the New Hampshire Legislature effective June 15, 1959, which took the control and supervision of the Area away from the County Commissioners and vested it in a Commission consisting of five members with broad powers not only of management but for future planning and development (Laws of New Hampshire, 1959, Ch. 399).

The County Commissioners discharged the respondent as manager, effective July 10, 1959. At the time that the respondent's services were terminated, the total assets of the Belknap County Recreational Area were $979,257.-00 (R.IV, 8). In 1958-59, its annual income was $200,-000.00 (R. IV, 32).

The respondent believed that the new Commission would employ him as manager or promoter, and he applied by telegram for the position of manager (R.III, 171, 172). The new Commission, however, under its Chairman, Dana S. Beane, Jr., employed one Warren Warner as the manager of the Area.

The respondent was, therefore, not only manager of the Area under the County Commissioners for nine years, but was also an active candidate for reappointment under the new Commission set up by the Act of 1959.

B. Public Criticism By The Petitioner Of The Operation and Management Of The Belknap County Recreational Area.

The petitioner was a merchant in Laconia, New Hampshire, who operated a variety store on Main Street (R.II, 56, 57). Since 1958 he had regularly contributed a daily unpaid column entitled "Out Of My Head" to the Laconia Evening Citizen, a daily newspaper with circulation throughout Belknap County (R.II, 39, 40). In these "volunteer" columns the petitioner made frequent reference to the operation of the Belknap County Recreational Area and was, to say the least, an outspoken critic of the way the County Commissioners operated and managed the Area. A series of these articles commencing December 11, 1958, are in evidence as Exhibits in the case and are printed in the Appendix of this brief. The respondent's complaint is based on one article alone, which was published on January 29, 1960, and reads as follows:

> "Listened to Highway Commish John Morton yesterday and came away with two distinct impressions. Rather, first was an impression. Second was a certainty.
>
> "Impression was that Morton deserves our sympathy. Is a man no longer young in years, trying to get along and hold on to his job, under the

terribly adverse circumstance of a governor to whom reason, logic, ordinary good sense, far less important than his own political best interests, a governor who examines every problem and makes every decision on basis of what is best for him, the governor; not what is best for people of State of New Hampshire.

"Certainty was that Laconia and this entire area have about as much chance of getting any new roads, bypasses, connections to Tilton, etc. as proverbial snowball in Hell while Wesley Powell is governor.

"Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.

"When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results?"

The article of January 29, 1960, was prompted by certain information which the petitioner had learned about

the operation of the Area in January of 1960 from the Chairman of the new Area Commission (R.II, 187, 188; R.V, 43, 44). The petitioner was one of those who had for a long time prior to 1959 advocated the establishment of a five-man Commission to run the Area instead of the County Commissioners. He understood that there was a movement afoot either to return the operation of the Area to the County Commissioners or to reduce greatly the management powers of the five-man Commission that had been established in 1959 (R.II, 84, 85).

The skiing season under the management of the Area Commission and Mr. Warren Warner, the new manager, started on December 20, 1959. There was one day of skiing and then, due to weather conditions, the Area was closed for skiing until December 28th, and from that time and through January, 1960, the Area was open to skiers (R.III, 29, 30; R.IV, 4, 5).

The new manager of the Area and the new Area Commission were checking the receipts from the Area on a day to day basis and particularly from weekend to weekend, which is when the bulk of the skiing is done, and making a comparison between the receipts in 1960 and the receipts in the prior year, 1959, under the old management of the respondent and the County Commissioners (R.III, 54; R.V, 70, 71, 79).

The new manager, Mr. Warren Warner, was giving the information as he received it to Mr. Dana S. Beane, Jr., Chairman of the new Area Commission (R.III, 54). Mr. Beane and the Commission had financial information that gave them "a comparative basis of daily receipts in total and by department" (R.V, 31, 32).

The petitioner, along with other interested members of the Laconia Chamber of Commerce, was present at a meeting held at the Belknap County Recreational Area in

January, at which time Mr. Beane, the Chairman of the new Commission, discussed certain improvements and changes that had been made by the new Commission in the operation and management of the Belknap County Recreational Area (R.II, 187, 188; R.V, 21, 22, 23, 24). No financial information, comparative or otherwise, was given out at this meeting.

After the meeting, the petitioner talked with Mr. Beane on the telephone and Mr. Beane told him they were doing "many times better" than in the prior years (R.II, 107, 118, 119; R.V, 43, 44).

Mr. Beane testified that the petitioner called him "at least once" requesting financial and other information concerning the Area (R.V, 43, 44).

After this the petitioner wrote:

"Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.

"When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results?"

The cash receipts during January, 1960, under the new Area Commission and under the management of Warren Warner, were $51,168.81 as compared with receipts of $22,744.25 during January, 1959, the last year that the respondent was manager. As a matter of fact, the cash receipts for January, 1960, were in excess of all prior January receipts starting in January, 1956. The receipts for January, 1956, were $12,661.14, the receipts for January, 1957, were $32,608.47, and the receipts for January, 1958, were $27,656.46 (R.V, 73, 74).

Before the article was published in the newspaper, it was read by both the city editor and the publisher of the Laconia Evening Citizen and in effect passed by both of them for publication (R.II, 47; R.V, 125, 126).

At no time did the respondent ask either for a retraction or clarification from the petitioner or the newspaper (R.II, 55).

II. THE LEGAL PROCEEDINGS BELOW.

The Rosenblatt article was published on January 29, 1960. On March 9, 1960, within forty days of publication of the article, suit was brought by the respondent against the petitioner, and another and separate action for libel with identical pleadings and an identical ad damnum of Two Hundred Thousand Dollars ($200,000.00) was brought by Robert Baer, son of the respondent, who had been employed by his father as assistant manager at the Area. On the same date, two other libel actions based on the same article were brought by the respondent and his son respectively against the Laconia Evening Citizen, the newspaper in which the article was published.

At the time of the pre-trial hearing on all four cases, the respondent's son took a voluntary nonsuit in his libel action against the petitioner. Prior to trial, the actions brought by the petitioner and his son against the news-

paper were settled for Two Thousand Dollars ($2,000.00) (R.I, 4, 9, 13).

The petitioner's position during the trial was that the manner of operation of the Belknap County Recreational Area and the conduct of the respondent as manager of the Area were matters of public concern and that, therefore, his article was privileged in the public interest. The petitioner claimed that the questions in his article were aimed primarily at the County Commissioners. He set forth his reasons for writing the article as follows:

> "I am asking the readers to ponder the vast distinction and effectiveness, in my judgment, between the politically oriented Belknap Area Commissioners' operation and an appointed Belknap Area Commission of professional persons; and I was keeping alive the continuing controversy which had gone on for, as I understand it, nearly two decades regarding the operation of the Area, and continues to go on to this present date. There is a bill in the Legislature now seeking to emasculate the present Area Commission" (R.II, 84).

After evidence had been introduced at the trial showing the public ownership of the Area and the public concern in its operation, the court made the following ruling in chambers:

> "Before you say anything, I am going to say that I am going to rule at the appropriate time, based on what I've heard now, that the general subject matter was a legitimate matter of public concern which would give Mr. Rosenblatt the opportunity to raise the defense of privilege" (R.III, 8).
> "Well, I've already said that I consider this Belknap Area — I've now heard enough; a few

days ago I hadn't heard anything — I've now heard enough to rule that the general subject matter is of sufficient public concern for Mr. Rosenblatt to raise the defense of privilege" (R.III, 12).

The petitioner duly moved for a nonsuit on the grounds that his article was privileged in the public interest and when that was denied, subject to exception, duly requested instructions to the jury to this effect and excepted to the court's refusal so to charge.

The respondent's claim of malice was based solely on the article, which gave rise to the suit itself, and other prior articles written by the petitioner and critical of the way the Belknap County Recreational Area was being operated and managed (See Appendix). There was no evidence introduced of any ill will or hostility on the part of the petitioner toward the respondent.

The petitioner asked that the jury be instructed that no evidence of malice had been presented. This request was denied. The jury brought in a verdict of $31,500.00 in favor of the respondent. Because of the important questions of law raised by the Judge's charge on privilege and malice, the Trial Judge's complete charge is set forth in the Appendix to this brief.

Petitioner's exceptions to these rulings, as well as other rulings of the Trial Court, were appealed to the Supreme Court of New Hampshire.

In March 1964, while the petitioner's brief to the Supreme Court of New Hampshire was in preparation, the Supreme Court of the United States handed down the decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The petitioner thereupon alleged in his brief to the Supreme Court of New Hampshire that his constitutional rights under the First and Fourteenth Amendments to the

United States Constitution had been abridged by the following action of the Trial Court:

(1) The Trial Court's failure to grant the petitioner's motion for nonsuit and directed verdict on the grounds that the article was privileged in the public interest;

(2) The Trial Court's failure to instruct the jury that the petitioner was entitled as a matter of law to the defense of privilege;

(3) The Trial Court's failure to rule as a matter of law that there was no evidence of actual malice.

The Supreme Court of New Hampshire in its opinion found no conflict with the United States Supreme Court's decision in the case of New York Times Co. v. Sullivan, 376 U.S. 254, and upheld the Trial Court's rulings and the Trial Court's charge.

SUMMARY OF ARGUMENT

I

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this Court decided that the constitutional guarantees of freedom of speech and of the press under the First and Fourteenth Amendments require "a federal rule that prohibits a public official from recovering damages

for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. It was decided in that case that this Court had no occasion then "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U.S. at 283, n. 23. The opinion made it clear, nonetheless, that the scope of the "public official" definition would not be tightly circumscribed by strict technical requirements, but would be realistically determined so as to allow full application of the public policy which is the reason for the privilege. That policy is that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270.

The petitioner in this case fits within the traditional concept of "public official." His position as manager and supervisor of a county-owned and operated public recreational area was expressly authorized by state law. However, traditional concepts of "public official" may be unworkable and inappropriate in the context of the privilege established in the Times case and the more realistic test suggested by that decision is whether or not the duties entrusted to the government employee are a subject of legitimate public interest and concern. On that score, the record shows clearly that the operation of the Belknap County Recreational Area was a continued subject of discussion, criticism, and concern among the people of Belknap County, and that petitioner's allegedly libelous remarks were part and parcel of a lively public debate on

the subject of how the Recreational Area should be managed and operated. Is is also clear that since these remarks were directed at the financial management of the Area, they were critical only of the "official conduct" of the respondent. In such circumstances, the petitioner is protected under the First and Fourteenth Amendments from civil libel suits brought by the public official who has been criticized and the judgment against him in the Trial Court, affirmed by the Supreme Court of New Hampshire, is in violation of his constitutional rights.

II

The Trial Court's charge on "malice" and the decision of the New Hampshire Supreme Court approving it was incorrect and contrary to this Court's decisions in New York Times Co. v. Sullivan, 376 U.S. 254, and Garrison v. Louisiana, 379 U.S. 64.

The only way in which the conditional privilege to criticize the official conduct of public officials can be lost is when the public official establishes that the allegedly libelous utterance was made with "actual malice" — that is, when he proves "that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." Garrison v. Louisiana, 379 U.S. 64, ..., 85 Sup. Ct. 209, 215 (1964). In the case at bar the New Hampshire Supreme Court approved an instruction of the Trial Court which permitted a finding of actual malice on irrelevant considerations of "ill will," "evil motive," "intention to injure," "wanton disregard of the rights of others," and "neglect of an obligation which the writer knows is liable to injure another." Baer v. Rosenblatt, 106 N.H. 26, 30 (1964). At no time was the jury instructed that in order to find "actual malice," it must find either that the petitioner knew that the statement sued upon was false or that it was made with reck-

less disregard of whether it was false or not. The New Hampshire Supreme Court committed reversible error in approving a charge that was constitutionally defective.

The jury was further erroneously instructed that the conditional privilege of comment upon a matter of public concern would be lost if the petitioner did not show that his statement was made in good faith and with a reasonable belief in its truth. The New Hampshire Supreme Court's approval of this instruction is in direct conflict with the decision of this Court in Garrison v. Louisiana, 379 U.S. 64, holding that the test laid down in New York Times "is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." 379 U.S. at ...., 85 Sup. Ct. at 218.

These errors of the Trial Court are more than sufficient for granting a new trial, but the judgment of the New Hampshire Supreme Court should be reversed because the evidence presented to prove actual malice "lacks the convincing clarity which the constitutional standard demands" and hence "would not constitutionally sustain the judgment for respondent under the proper rule of law." New York Times Co. v. Sullivan, 376 U.S. 254, 285-6 (1964). The only alleged evidence of malice was the article sued upon and other writings of the petitioner directed to the management and operation of the Area. All of these articles would have been conditionally privileged if sued upon as defamatory and none of them constitutes evidence of actual malice as defined in New York Times. The petitioner's evidence showed that he had made a reasonable investigation of the facts before writing the article. The words sued upon do not by themselves constitute a statement, much less a false statement. They merely ask a question: "What happened to all the money last year? and every other year? What magic has Dana

Beane and rest of Commission, and Mr. Warner wrought to make such tremendous difference in net cash results?" No jury should be permitted to find knowledge of falsity or reckless disregard for truth in these simple questions, when the petitioner was not even aware that his words might be interpreted as referring solely to the respondent, much less given the interpretation they were and made the basis of this lawsuit.

III

The criticism intended by petitioner's article was directed not at the respondent personally, but at the whole hierarchy of government employees responsible for the operation and management of the Belknap County Recreational Area. An "otherwise impersonal attack on governmental operations" may not be transmuted into "a libel of an official responsible for those operations." New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

ARGUMENT

I. THE RESPONDENT AT THE TIME OF HIS EMPLOYMENT AS SUPERVISOR AND MANAGER OF THE BELKNAP COUNTY RECREATIONAL AREA WAS A "PUBLIC OFFICIAL" UNDER THE DECISIONS OF THIS COURT IN NEW YORK TIMES CO. V. SULLIVAN, 376 U.S. 254, AND GARRISON V. LOUISIANA, 379 U.S. 64.

A. The Law.

The respondent in this case was clearly a "public official" within the scope of the privilege enunciated in the New York Times and Garrison decisions. The article, if it refers to respondent at all, refers to his official conduct as manager of the Belknap County Recreational Area, a facility owned by Belknap County and under the control of the County Commissioners at the time that respondent was manager. The position of manager was a statutory position for which respondent was hired by the County Commis-

sioners with the approval of the County Convention (R.I, 171, 172). He was in complete charge of a million-dollar enterprise with an annual income of $200,000.

In order to answer the question specifically asked by this Court as to whether or not the respondent was a "public official" within the meaning of the Times decision and the Garrison decision, we address ourselves to the meaning of the phrase "public official" within the framework of the constitutional law of libel.

As we read the Times and Garrison cases, they stand for the proposition that the First Amendment protects freedom of speech on matters of legitimate public interest and concern. We suggest that a sound application of the phrase "public official" does not turn on whether the official libeled actually holds the office, as opposed to being a candidate for the office, on whether his was an elective or an appointive office, or on his category or title in the hierarchy of public servants. The real crux of the matter is whether or not his official conduct in the office in question is a subject of legitimate public interest and concern. The First Amendment protection was intended to foster and allow uninhibited debate about matters concerning the public welfare. New York Times Co. v. Sullivan, 376 U.S. at 269-70. As this Court has said in Garrison v. Louisiana:

> "Moreover, even where the utterance is false, the great principles of the Constitution, which secure freedom of expression in this area, preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly

> believed contribute to the free interchange of ideas and the ascertainment of truth." 379 U.S. at ... , 85 Sup. Ct. at 215.

To limit the ruling in the Times case by applying it only to certain specific categories of public officials or public servants would in effect be nullifying the protection guaranteed by the First Amendment. The only test of a public official that will give the First Amendment the scope intended by the decision in the Times and Garrison cases is whether or not the official had the responsibility and duty for action or decision in an area in which the public had a legitimate interest and concern.

Previous decisions of the Supreme Court show that the test is not the title or the rank or how the official obtains his position, but the test is rather his duties and responsibilities and the public interest and concern therein.

So in Gandia v. Pettingill, 222 U.S. 452 (1912), Mr. Justice Holmes refers to the plaintiff, U.S. Attorney for Puerto Rico, as "a public officer, in whose course of action connected with his office the citizens of Puerto Rico have a serious interest," 222 U.S. at 457 (emphasis added), and held that anything bearing on such action was a legitimate subject of statement and comment.

Mr. Chief Justice Warren in Wood v. Georgia, 370 U.S. 375 (1962), quoting Thornhill v. Alabama, 310 U.S. 88 (1940), said:

> " 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' " 370 U.S. at 388. (Emphasis added).

The Chief Justice also quoted 2 Cooley, Constitutional Limitations 885 (8th Ed. 1927):

> "The purpose of the First Amendment includes the need: '. . . to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of that authority which the people have conferred upon them.' " 370 U.S. at 392. (Emphasis added).

This Court in recognizing the value of uninhibited, robust, and wide-open debate on public issues, has even gone to the extent of clothing public executive officers with absolute immunity for defamatory statements made within the outer perimeter of their official duties. In Barr v. Matteo, 360 U.S. 564 (1959), the Court said:

> "The privilege is not a badge or emolument of exalted office but an expression of a policy designed to aid in the functioning of government . . . . It is not the title of his office, but the duties with which the particular officer sought to be made to respond in damages is entrusted . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at 573-4.

The dissenting opinion also recognized the paramount interest of the public in discussion and criticism of government but felt that the immunity allowed by the majority decision would inhibit rather than encourage such discussion and criticism. Chief Justice Warren said:

> "But more important, the opinion has set out the wrong interests and by its extension of absolute

> privilege in this case has seriously weakened another great public interest — honest and open discussion and criticism of our government." 360 U.S. at 586.

In the case of criticism of a public official by a member of the public, the threat of a libel suit by the official against the critic is only a deterrent and inhibition to full and free criticism.

In the cases of Henry v. Collins and Henry v. Pearson, 85 Sup. Ct. 992 (1965), this Court accepted without question the fact that a county attorney and the Chief of Police of Clarksdale, Mississippi, were public officials within the holding of the Times and Garrison decisions.

The Restatement, Torts Sec. 607 (1938), states the rule that should apply comprehensively and succinctly as follows:

> "The privilege of criticism [of so much of another's activities as are matters of public concern] includes a privilege to criticize the public conduct of all officers and employees of the United States, a State or Territory thereof, or a municipal corporation of a State or Territory, and all candidates for such office and applicants for such employment, insofar as the conduct of such officer, employee or candidate, is a matter of public concern for those to whom the criticism is published."

There are a number of State cases that also express concern with the substance rather than the form on this question.

In Holway v. World Publishing Co., 171 Okla. 306, 44 P. 2d 881 (1935), the plaintiff was a civil and hydraulic engineer employed under a contract with the water commission of the city as supervisory engineer of a water

project. In a libel action, judgment for the defendant was affirmed. The court upheld an instruction that the article published by the defendant "is concerning a public servant, and a matter of public interest; and that comment and criticism of a public servant and on a matter of public interest are privileged." 171 Okla. at 311, 44 P. 2d at 888. (Emphasis added). The court expressly recognized that Holway was not a public officer, but was an employed engineer and a public servant.

In James v. Haymes, 160 Va. 253, 168 S.E. 333 (1933), the plaintiff was a contractor under contract with the State Highway Commission to build a road. It was held that since the plaintiff was paid with public funds for the construction of a public highway, which is a matter of public concern, the work upon which he was engaged was a subject of fair and honest comment or criticism by newspapers as well as by any other citizen.

In Clark v. McBain, 299 Mo. 77, 252 S.W. 428 (1923), the court, speaking about a teacher of law in the State University who had been removed and who was a candidate for reappointment, held that his was "a public position of great responsibility and obvious interest to citizens generally of the state and that comments on his fitness and qualification for that office were privileged." 259 Mo. at 94, 252 S.W. at 432. (Emphasis added).

The most sweeping definition of public interest and public concern against a background of criticism of a public official was in the case of Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908), in which the court said that the "correct rule":

> "must apply to all officers and agents of government, municipal, state and national; to the management of all public institutions, educational, charitable and fiscal; to the conduct of all corporate enterprises affected with the public

interest; transportation, banking, insurance, and to innumerable other subjects affecting the public welfare." 78 Kan. at 734-35, 98 Pac. at 289.

In the New York Times decision, this Court quoted with approval a further statement in the Coleman case to the effect that the good faith privilege " 'extends to a great variety of subjects and includes matters of public concern, public men and candidates for office.' " 376 U.S. at 281 2. (Emphasis added).

A note at 62 Harvard Law Review 1207 (1949) on Fair Comment indicates the intimate connection between public interest and public officials:

> "Since fair comment is an affirmative defense derogating from an otherwise perfected liability, the defendant must satisfy the Court that the subject matter of the comment is of such interest to the public that he should be free to make it without paying for the harm he does by defaming the plaintiff. Thus it is well settled that subjects of public interest for this purpose include the official or otherwise public activities of executive, legislative or judicial officers, elective or appointive; the conduct of candidates for elective office as far as pertinent to their elections; work done for governmental institutions by independent contractors paid out of public funds; private activities or institutions affecting a substantial number of the public; public performances or exhibitions of music, drama or sports, or works of art; and anything else inviting public attention and approval, such as books, articles or advertisements." 62 Harv. L. Rev. at 1207-8. (Emphasis added).

Decisions since New York Times reflect a general understanding that the case extends the protection of the First Amendment to criticism of official conduct of a public official relating to matters of legitimate public interest and concern.

In H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515 (N.D. Tex. 1964), the court held that an article accusing the plaintiff of violating the United States embargo to Cuba was not libelous under the Texas statute and held the article to be fair comment on a matter of public concern "which under the First Amendment to the Constitution of the United States, the defendant had a right to publish, even if in fact plaintiff had not engaged in such shipping." 228 F. Supp. at 519, citing New York Times.

In Gilberg v. Goffi, 251 N.Y. S. 2d 823 (App. Div. 1964), the court said, citing New York Times:

> "All utterances addressed to public officials when challenged in a civil libel action, must be accorded the constitutional safeguards for freedom of speech inherent in the First and Fourteenth Amendments of the Federal Constitution . . . . The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials, in the performance of their duties, enjoy a concomitant immunity when they speak out on matters of public concern even if a particular citizen be defamed in the process. The threat of a damage suit should not be permitted to inhibit or curtail the freedom of either the citizen or the public servant." 251 N.Y. S. 2d at 824.

In the Goffi case the plaintiff claimed he was not a public official. The plaintiff was a lawyer and a partner in the Mayor's law firm. The defendant was a candidate for office and made statements in a campaign speech about

the Mayor's law firm. The court held that the defendant's action was so closely related to criticism of a public official that the Times case was determinative. The court also found that the plaintiff failed to establish that he was personally vilified by a reference to the "Mayor's law firm," again citing New York Times, and that the defendant's utterances were "part and parcel of a debate on the public issue." 251 N.Y. S. 2d at 830.

B. The Facts.

1. The Public Interest and Concern.

The people of Belknap County showed a continuing and lively interest and concern in the operation and management of the Belknap County Recreational Area ever since its construction. As taxpayers and owners of this Recreational Area the citizens of Belknap County were vitally interested in its financial operation. Debate, discussion and criticism by the public of the way the Area was run became as much a part of the local scene as the skiers and the winter snows (see Statement of the Case, pp. 3-4, 8-9; R.I, 155, 156, 157, 200, 201; R.II, 14; R.III, 92, 117, 135, 136).

One tangible result of this public discussion and criticism was a change in the entire method of management and operation of the Area. Control was taken away from the politically-elected County Commissioners and turned over to a five-man Commission appointed by the County Delegation with greatly enlarged powers of management (Laws of N.H. 1959, Ch. 399).

The history of the Belknap County Recreational Area is an illustration in miniature of how change is brought about in a democracy by uninhibited public debate and criticism of government.

2. The Duties and Responsibilities of Respondent.

There can be no doubt that the respondent had the

responsibility for managing the Area and making decisions as to its day-to-day operation. The contract under which he was employed in 1953 specifically gave him complete powers of management and supervision (Exhibit 17; R.I, 171, 172). He acknowledged in his pre-trial deposition (Petitioner's Motion to Dismiss, Reserved Case, p. 7) that he considered the operation of the Area a matter of public concern, that he was a trustee of public funds, and that the people of Belknap County had the right to know as much about the operation of the Area as possible and that they were entitled to have the correct financial information concerning his management.

If a member of the public wanted to criticize the operation and management of the Belknap County Recreational Area, he would criticize the respondent or the County Commissioners or both. This is precisely what the petitioner did. He published a series of articles which were either critical of the respondent or the County Commissioners or both. Most of the articles asked questions as to why certain things were being done and certain things were not being done at the Recreational Area (see Appendix).

We submit that on the basis of the undisputed facts the respondent was a public official within the meaning of the decisions in the Times and Garrison cases. We do not think that the decisions in either of these cases have to be extended or distorted in any way so to hold. Therefore, the article complained of is afforded the protection of the First Amendment unless there was evidence in the case of actual malice.

II. THE RESPONDENT FAILED TO PROVE ACTUAL MALICE

A. The Definition Of Actual Malice Adopted By The Trial Court and Approved By The New Hampshire Supreme Court Was Incorrect Under The Decisions

Of This Court In New York Times Co. v. Sullivan, 376 U.S. 254, And Garrison v. Louisiana, 379 U.S. 64.

The definition of malice adopted by the Trial Court in its charge to the jury was taken from the case of Chagnon v. The Union Leader Corp., 103 N.H. 426, 174 A. 2d 825 (1961), cert. denied, 369 U.S. 830 (1962), which is the leading case in New Hampshire on the law of libel, and the case that the New Hampshire Supreme Court leaned on heavily in deciding this case. In the Chagnon case the New Hampshire Supreme Court approved a charge to the jury which defined malice as follows:

> " 'By malice I mean not only ill will, evil motive or intention to injure, but also a wanton disregard of the rights of others and the consequences likely to follow.' " 103 N.H. at 438, 174 A. 2d at 833.

This definition of malice by the Trial Court was approved by the New Hampshire Supreme Court, Baer v. Rosenblatt, 106 N.H. 26, 30 (1964), and was held by that court to be the correct definition even in cases of libel brought by public officials.

The decisions of this Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964), make it clear that the definition of malice approved in the Chagnon case is constitutionally defective when applied to a libel action brought by a public official for criticism of his official conduct. In these two decisions the Court held that the only valid test for determining actual malice in a libel action brought by a public official is whether or not the utterance sued on was made "with knowledge of its falsity or in reckless disregard of whether it was false or true." 379 U.S. at ...., 85 Sup. Ct. at 215; 376 U.S. at 279-80.

This test was applied again by this Court in Henry v.

Collins and Henry v. Pearson, 85 Sup. Ct. 992 (1965), and the Court reversed a libel judgment in favor of a public official, because "the jury might well have understood the instructions to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood." 85 Sup. Ct. at 993. It is clear that evil motive or intention to injure is irrelevant to the issue of actual malice in cases of libel brought by public officials unless it can be shown to have been coupled with knowledge on the part of the defendant that his statement was false or was made in reckless disregard of whether it was false or not.

Nowhere, in either the Trial Court's charge or in the New Hampshire Supreme Court's opinion approving it, is there any mention made of this crucial element in the definition of "actual malice." The Trial Court, in fact, committed compound error by lifting from the Chagnon case without alteration its incorrect definition of malice and by adding to it the following words of its own:

> "And it (malice) may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another regardless of the consequences, even though there is no actual intention to hurt or harm an individual (R.V, 161)." (Emphasis added).

Thus, under the New Hampshire rule, any kind of reckless conduct which is "liable to injure another" became a sufficient basis for a finding of malice. Since defamatory criticism is inevitably injurious to the person defamed, this part of the charge was equivalent to instructing the jury that it must find malice on the facts of the case. Yet the Supreme Court of New Hampshire sustained the language of this charge (106 N.H. at 30), and blithely ignored the test established in the Times case. The charge as sustained dilutes the meaning of malice even more than

the charge which was found to be constitutionally deficient by this Court in Henry v. Collins and Henry v. Pearson, 85 Sup. Ct. 992 (1965), which read:

> "The Court instructs the jury for the plaintiff that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a willful and wanton disregard of the rights and interests of the persons defamed." 85 Sup. Ct. at 993.

The New Hampshire Supreme Court also held that the Trial Court correctly charged the jury on the law of conditional privilege and found that there was "no conflict with the Times decision." 106 N.H. at 34. The court based this holding on its observation that "the instructions did not require the defendant to prove the truth of a privileged communication if it was made with good motives and reasonable belief of its truth." 106 N.H. at 34. The instruction referred to was to the effect that to establish the defense of privilege, the burden was on the petitioner to prove to the jury all of the following facts:

> "First, that the article was published on a lawful occasion, that is, in good faith, and for a justifiable purpose; and second, that what was published was founded on reasonable grounds for belief and on reasonable grounds" (R.V, 152).

It was an unconstitutional infringement of petitioner's right of free speech under the First Amendment to place upon him the burden of proving his "good faith" in publishing the statements sued upon. The Garrison case holds explicitly that the privilege of criticism established in New York Times can be lost only by a showing of actual malice, i.e., knowledge that the statement was false or a reckless disregard of whether it was false or not. Lack of reasonable belief in the truth of what was said cannot

constitute actual malice and cannot be grounds for loss of the privilege. "The reasonable belief standard applied by the trial judge is not the same as the reckless disregard of truth standard." Garrison v. Louisiana, 379 U.S. 64, ..., 85 Sup. Ct. 209, 218 (1964).

In this case, as in the Garrison case, the Trial Court charged that petitioner's belief in the truth of his statements "must be founded on reasonable grounds and on grounds that would satisfy the ordinary man of average prudence" (R.V, 156). But the test which this Court laid down in New York Times "is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." Garrison v. Louisiana, 379 U.S. 64, ..., 85 Sup. Ct. 209, 218 (1964).

Despite the statements by the New Hampshire Supreme Court that "the Trial Court correctly charged the jury on all these applicable principles of law" and that there was "no conflict with the Times decision," 106 N.H. at 34, the charge not only incorrectly defined malice but failed to instruct the jury that the burden of proof as to malice was on the respondent.

The Trial Court instructed the jury that if malice were found, a more liberal rule of damages could be applied but gave no indication that unless the plaintiff proved actual malice there could be no recovery at all. He did not define malice except in that portion of his charge covering the issue of damages. Since the issue of malice, even as defined in the Chagnon case, was never properly submitted to the jury at all, it cannot be said that the jury found malice or even considered the issue. The statements of the New Hampshire Supreme Court holding in effect that the charge was in accord with the Times decision have no basis in the language of the charge itself. So the

New Hampshire court committed reversible error when it held:

> "We are of the opinion that the jury could find on the evidence that the defendant lacked reasonable grounds to believe in the truth of the statements he published; that by his prior utterances he demonstrated animosity toward the plaintiff; and that the defamatory statements, which are the basis of this action, were published with actual malice and consequently not privileged." 106 N.H. at 32.

B. There Was No Evidence Of Actual Malice.

But under whatever test is used, including the test of the Chagnon case, there was no evidence in this case upon which a jury could base a finding of actual malice.

It is clear from the record that the petitioner before writing the article on January 29, 1960, had made an investigation as to the receipts compared with the prior year and had information that could lead a reasonable man to come to the conclusion that compared with the receipts for January, 1959, the receipts for 1960 were at least 200% better (see Statement of the Case, pp. 11-13). Prior to writing the article the petitioner had been present at a meeting at which the Chairman of the new Area Commission had discussed the improvements and changes that had been made (R.V, 21, 22; Exhibit 49). After this meeting the respondent talked on the telephone with the Area Chairman relative to its financial operation (R.II, 107, 118, 119; R.V, 43, 44).

The petitioner testified that one of the reasons for writing this article was to forestall any return to control by the County Commissioners (R.II, 84, 85, 86). He thus had a reason for using the words "literally hundreds of per cent better than last year" and the characterization of

"difference in cash income fantastic, almost unbelievable" is neither distorted nor unreasonable considering the fact that the petitioner was trying to bring to the attention of the public the improvements that had been made by the new Area Commission.

Under the circumstances, and bearing in mind the continuing public discussion and criticism of the operation and management of the Area, the question: "What happened to all the money last year? and every other year? What magic has Dana Beane and rest of Commission, and Mr. Warner wrought to make such tremendous difference in net cash results?", can certainly be interpreted to be fair comment on the improvements that had been made under the new setup.

There is no evidence that the petitioner knew that he had made any false statements or that he had acted in reckless disregard of whether the statements he made were false or not. As a matter of simple grammar he made no statement at all. He simply asked a question: "What happened to all the money last year? and every other year?" This question was asked after the petitioner had learned from the Chairman of the new Area Commission that they were doing "many times better" than in the prior years (R.II, 107, 118, 119; R.V, 43, 44). There was a significant difference in the January receipts of 1960 and the January receipts of the prior year. The evidence was that in 1960 the receipts were $51,168.81. In 1959, the receipts were $22,744.25. The same comparison holds for receipts in prior years. In 1958, the January receipts were $27,656.96; in1957, $32,608.47; and in 1956, $12,661.14 R.V, 73, 74).

Even under the test of the Chagnon case (supra, p. 31), which included ill will, evil motive or intention to injure as one of the vital elements in the definition of

malice, there is no evidence to sustain the verdict. The record is bare of any evidence that the petitioner bore any ill will toward the respondent or had any evil motives in writing the article or that he intended to injure the respondent. It is claimed that the newspaper articles written by the petitioner are evidence of malice. A careful reading of the entire series of articles written by the petitioner on the subject of the Belknap County Recreational Area, which are printed in the Appendix, shows the following:

1. The petitioner speaks of the respondent as "Fritzie Baer" and he speaks of him in a kindly and friendly manner (Appendix, Exhibits 24, 25, 34).

2. The petitioner only once criticized the respondent personally and that was in his article in which he referred to "nepotism" at the Area when he was commenting on the fact that the respondent had employed his family at the Area (Appendix, Exhibit 34). The facts show that the respondent indeed had employed his wife, his two sons, and his son's wife at the Area during his term as manager (R.III, 176, 177, 186, 187). The term "nepotism" was, therefore, neither inaccurate nor untrue, nor was it proper evidence of malice under the incorrect test applied by the Supreme Court of New Hampshire.

It must be borne in mind that the petitioner was an unpaid columnist. The title of his column "Out Of My Head" was certainly not calculated to impress anyone with the factual correctness of his comments. The articles that the petitioner wrote were turned over to the newspaper which had a right to reject any part of an article or all of it (R.II, 47; R.V, 125, 126). This case does not concern a competent, professional reporter working on a special assignment with all of the resources and money of a newspaper behind him. The article was the comment of an amateur journalist who made what to him appeared to be

a reasonable investigation before he ventured an opinion.

The Court's attention is directed to the case of Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P. 2d 150 (1959). In that case, as in the case at bar, the plaintiffs contended that there was ample evidence of malice in other articles and editorials written about the plaintiffs. The court insisted that, since the article of the defendant was qualifiedly privileged, the burden was upon the plaintiff to prove the falsity of the article and that "actual malice, i.e., malice in fact," prompted its publication. The court found no such evidence. In commenting upon the plaintiffs' contention that other articles and editorials showed the defendant's bias and prejudice against the plaintiffs and a peculiar interest in the election in which the plaintiffs were candidates, the court said:

> "But the only evidence offered by the plaintiffs concerning malice are the editorials and one news item, all of which carry a qualified privilege. Malice cannot be inferred from an article on a privileged occasion alone. When privileged statements are offered to show malice, none of them are admissible unless some independent proof of malice other than such privileged statements are first offered." 82 Ariz. at 277-78, 312 P. 2d at 155. (Emphasis added).

It is submitted that the rule in the Arizona case is the rule that should be applied to any case involving successive newspaper criticisms of a matter of public interest and concern.

This Court in New York Times held that the proof of malice lacked "the convincing clarity which the constitutional standard demands." It is submitted that the evidence in this case on the issue of malice also lacks the convincing clarity required by the constitutional standard.

III. AN IMPERSONAL ATTACK ON COUNTY GOVERNMENT WAS UNCONSTITUTIONALLY TRANSMUTED INTO A LIBEL AGAINST A SINGLE GOVERNMENT OFFICIAL.

In this case, as in New York Times, there was no reference to the respondent in the article, either by name or by official position. The Alabama Court in the Times case had proposed that in measuring the performance or deficiencies of a group, praise or criticism is usually attached to the official in complete control of the body, even when he is not singled out. New York Times Co. v. Sullivan, 376 U.S. 254, 291 (1964). The same argument was adduced in the present case in order to prove that the defamatory matter concerned the respondent. In other words, the respondent contended that he was the responsible manager of the Area, and, therefore, any question as to what had happened to its income must necessarily be attributed to him. This Court, in New York Times, held that the proposition of the Alabama Court had "disquieting implications for criticism of governmental conduct," and "strikes at the very center of the constitutionally protected area of free expression." 376 U.S. at 241, 242. This Court held that "such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." 376 U.S. at 292.

It is the petitioner's position that when he asked in his column, "What happened to all the money?", he was attacking the governmental operation of the Area by the County Commissioners, and any suspected diversion of funds, if the question is so interpreted, could have been perpetrated by any one or a combination of numerous individuals in the operation, i.e., by the ticket salesmen, restaurant employees, manager, assistant manager, treasurer, or by the County Commissioners themselves.

Similarly, if the question is interpreted as being critical of the Area's failure to produce adequate revenues (petitioner's contention), then the responsibility for this lies as much with the County Commissioners as with the manager.

It was, under the New York Times decision, unconstitutional to transmute this impersonal attack on a governmental operation into a libel on the manager responsible for the operation.

CONCLUSION

For the reasons stated, this Court should find that the judgment against the petitioner in the New Hampshire Supreme Court is a violation of his rights under the First and Fourteenth Amendments, as applied in the decisions of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964). Accordingly, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE NEW HAMPSHIRE SUPREME COURT

FRANK P. BAER v. ALFRED D. ROSENBLATT

Argued June 2, 1964.

Decided October 6, 1964.

Action for libel of the plaintiff by the defendant in an article written by him and published in the Laconia Evening Citizen on January 29, 1960.

Trial by jury resulted in a verdict for the plaintiff in the amount of $31,500.

Certain exceptions of the defendant were reserved and transferred by Grant, J.

Doherty & Dyer and McLane, Carleton, Graf, Greene & Brown (Mr. Stanley M. Brown orally), for the plaintiff.

Nighswander, Lord & Bownes and Conrad E. Snow (Mr. Hugh H. Bownes orally), for the defendant.

LAMPRON, J. On April 15, 1950, the Belknap county commissioners who had the legal control of the Belknap County Recreational Area at Gilford, hired the plaintiff, Frank (Fritzie) P. Baer, as supervisor of the area. Their written agreement provided that Frank P. Baer will "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (par. 5); "transmit all funds accruing from said recreational area to said county commissioners" (par. 6); "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same" (par. 7).

Under a renewed agreement, dated November 27, 1953, containing the above provisions, plaintiff continued as such supervisor until he was advised on June 23, 1959,

that the county commissioners were exercising their right to terminate their contract effective July 10, 1959.

As of September 15, 1959, by virtue of Laws 1959, c. 399, the operation of this area was placed in a commission of five members. Dana S. Beane, Jr. was its first chairman. In November, 1959, the commission hired Warren Warner as manager of the area.

Since 1958, the defendant, a merchant in Laconia, regularly contributed a daily unpaid column in the Laconia Evening Citizen which was entitled "Out Of My Head." Some of these articles, starting with one published on December 11, 1958, referred to the plaintiff in conjunction with the Belknap Recreational Area.

Defendant's column, which is the basis of this action, was published January 29, 1960, when the plaintiff was no longer connected with the area. It read in part as follows:

"Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year.

"When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results."

On March 9, 1960, the plaintiff instituted this action of libel alleging that the above article could be and was understood to mean "that the difference in the net cash results of the income of said Area was due because the plaintiff had committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use," and that "said false, scandalous, malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule."

On March 6, 1963, approximately three years after plaintiff instituted this action, the defendant moved for a change of venue. He based his motion on the fact that he "as a columnist has frequently made forthright, caustic, and barbed remarks about many affairs in the City of Laconia and in Belknap County, including . . . the management past and present of the Belknap County Recreation Area" and that his remarks "have undoubtedly ruffled the feelings of many people in Belknap County and have made him an object of antagonism by many people in Belknap County." "Some people admire his forthright comments . . . and many other people dislike him intensely for the comments." He alleged that for this and other reasons it was probably impossible he would receive a fair and impartial trial in Belknap county.

The Superior Court has authority to change the venue in an action. RSA 507:11; Cochecho R.R. v. Farrington, 26 N.H. 428, 445. A change should be made if there is probable ground to apprehend that a fair and impartial trial cannot be had in the particular county. Hilliard v. Beattie, 58 N.H. 112. This is a matter within the discretion of the Trial Court whose determination will not be disturbed unless a plain abuse of that discretion is shown. Whitcher v. Association, 77 N.H. 405, 407. The record does not compel a conclusion that there was abuse. State v. Small, 99 N.H. 349, 352.

We agree with the statement in defendant's brief that "it seems clear that the questions of whether or not the plaintiff was within the orbit of the words of the article and whether the article imputed wrong-doing to the plaintiff were properly left for jury determination." As it could be found that the newspaper article complained of was defamatory of the plaintiff and damaging to him, the defendant could properly be found liable unless the publication was justified or excused.

Justification is established if the facts stated are true and are published with a justifiable motive. Hutchins v. Page, 75 N.H. 215; Chagnon v. Union-Leader Co., 103 N.H. 426, 437. There was ample evidence to warrant a finding by the jury that the defamatory statements of facts made in this column were not substantially true and that the comments made thereon were unjustified. Restatement, Torts, s. 582, comment e; Prosser, Torts (2d ed.) s. 96, p. 632.

"Even though a defendant cannot justify the publication because it can be found to be untrue he may excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth." Chagnon v. Union-Leader Co., supra, 438.

Statements of facts and comments based thereon made by the defendant about the management of the Belknap Recreational Area could be found to constitute a lawful occasion and the basis of a privilege. However they would constitute a lawful occasion and a privilege only if they were published in good faith and with a belief, founded on reasonable grounds, of their truth. State v. Burnham, 9 N.H. 34; Lafferty v. Houlihan, 81 N.H. 67, 71. A court, therefore, cannot rule that a communication is

privileged in the public interest without assuming the conditions on which it is held to be privileged, namely, that it was made with good motives and upon probable grounds of its truth. Lafferty v. Houlihan, supra, 72. Where, as in this case, the motives of the defendant and his basis for believing his statements to be true were both in controversy, the Trial Court properly denied defendant's motion that it rule before trial that his article, in the absence of malice or bad faith, was privileged in the public interest.

For the same reason the Trial Court properly refused defendant's request that the jury be charged as a matter of law that there was a lawful occasion for the publication of defendant's article. An examination of the Court's charge in its entirety reveals that the jury was properly instructed on these issues.

The law is well established that a defamatory statement made with malice cannot be excused as privileged. Chagnon v. Union-Leader Co., 103 N.H. 426, 438. Also when the element of malice enters into the wrong the rule of damages is different and more liberal. Bixby v. Dunlap, 56 N.H. 456, 462, 463. The burden of proving malice to defeat the defense of privilege as well as to invoke the more liberal rule of damages is on the plaintiff. Hutchins v. Page, 75 N.H. 215; Saladino v. Gurdy, 80 N.H. 211; 1 Harper & James, Law of Torts, s. 5.27, p. 455. The Trial Court properly defined malice in its charge to the jury as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others. Malice . . . may consist of the intentional publication of defamatory matters with a reckless disregard of the rights of others, and it may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another, regardless of the consequences, even though there is no actual intention to hurt or harm an

individual." Chagnon v. Union-Leader Co., supra; New York Times Company v. Sullivan, 84 S. Ct. 710, 726 (1964).

The defendant stated in part in the article complained of "Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning. This year, a year without snow till very late . . . the difference in cash income simply fantastic, almost unbelievable. On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year. When consider that last year was excellent snow year . . . one can only ponder following question: What happened to all the money last year? and every other year?"

Defendant testified that by "literally hundreds of per cent BETTER" he meant to say that the cash income for "this year" was more than twice but not necessarily more than three times what it was "last year." The jury could find on the evidence that on the figures available when defendant wrote his article there was very little difference in the cash income for the two years compared in defendant's column.

Defendant testified "had I not been told that there was a great difference between that January and the other January, I would probably not have had occasion to write the article." There was evidence from which the jury could find that the sources of information given by the defendant as bases for his statements gave no support for what he wrote. "Probable cause is undoubtedly a circumstance, and a strong one, to rebut any presumption of malice; as the absence of it is evidence to show malice." State v. Burnham, 9 N.H. 34, 44; Shackett v. Bickford, 74 N.H. 57; 1. Harper & James, Law of Torts, s. 5.27, p. 455; 33 Am. Jur., Libel and Slander, s. 266, p. 248.

In an article dated January 9, 1959, defendant asked a series of questions about the operation of the area which

he invited the plaintiff or the county commissioners to answer. On January 12, plaintiff's son, who worked at the area, endeavored to answer these questions by a letter to the editor published in the Laconia Evening Citizen and in it he also invited defendant to obtain a copy of all area expenditures and income at the county court house and stated that "I do feel that the best answers to all the people's doubts and questions can best be answered by the County Comm., County delegation members, and Area management at the annual Budget meeting open to all County residents. This meeting is coming up soon." On January 21, defendant published in his column that he had not yet heard from the plaintiff and the commissioners as to these questions. On January 27, defendant's column stated that the plaintiff in a public speech on January 22, said he was not going to answer the questions and defendant asked "why."

In an article published February 14, 1959, the defendant characterized the area as "an antique relic run for benefit of one family and favored few friends." June 25, 1959, after plaintiff's employment had been terminated, defendant wrote "Commishes responsible for hiring and firing of County personnel. That their legal duty and obligation cannot offhand simply assume they did it without reason. Maybe they had darned good reasons. Not fair to jump to conclusions without having asked them. After all Fritzie did have substantial portion his own family on County payroll. Maybe this good . . . maybe not. Certainly on face of it, nepotism hardly best kind public policy." January 29, 1960, the column which is the basis of this action asked "What happened to all the money last year? and every other year?" The plaintiff was supervisor of the area in charge of income and disbursements during the time inquired about.

Any or all of the statements in these articles could be

considered by the jury in their determination of whether the defendant was actuated by malice in publishing the article of January 29, 1960. Saladino v. Gurdy, 80 N.H. 211, 213; II Wigmore, Evidence, ss. 403, 404. We are of the opinion that the jury could find on the evidence that the defendant lacked reasonable grounds to believe in the truth of the statements he published; that by his prior utterances he demonstrated animosity toward the plaintiff; and that the defamatory statements, which are the basis of this action, were published with actual malice and consequently not privileged. Chagnon v. Union-Leader Co. 103 N.H. 426, 440.

We consider next the following argument of the defendant as stated in his brief. "The verdict of $31,500 against the defendant, brought about by the failure of the Trial Court to grant defendant's motions for nonsuit and for directed verdict on the grounds of privilege, his failure to direct the jury that defendant's published criticism was a matter of public concern, and that defendant was entitled to the defense of privileged criticism, his leaving to the jury the issue of malice of which there is no evidence, and his placing the burden on the defendant to prove the truth of his criticism, was a violation of the First and Fourteenth Amendments of the United States Constitution." Reliance for this position is placed on New York Times Company v. Sullivan, 84 S. Ct. 710 (1964).

The Times case was an action for libel brought by one of three elected commissioners of the city of Montgomery, Alabama, as a result of a Times "editorial" advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of certain negro movements. A verdict of $500,000 was returned for the plaintiff. "Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person . . .

in his reputation' or to 'bring [him], into public contempt . . . . Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars . . . . Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight . . . . Unless he [defendant] can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury." New York Times Company v. Sullivan, supra, 719.

The court held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id., 726. This rule "delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Id., 727.

Under New Hampshire law even if there is a libel per se defendant need not prove the truth of the stated facts to escape liability. He may escape liability if he proves a privilege by showing that the facts (although untrue) were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of their truth. Chagnon v. Union-Leader Co., 103 N.H. 426, 438. "This is a very different thing from showing the actual truth." Carpenter v. Bailey, 53 N.H. 590, 594. It has long been our law that good motives and belief in truth are strong circumstances to rebut any inference of malice. State v. Burnham, 9 N.H. 34, 44. Carpenter v. Bailey, supra.

Under New Hampshire law, unlike the Alabama law

which prevailed in the Times case, even if the defendant in an action based on a libel per se cannot prove the truth or substantial truth of what was published, there can be no recovery if the defendant establishes the defense of privilege and it is not rendered inoperative by his actual malice which is not to be presumed but proved by the plaintiff. Lafferty v. Houlihan, 81 N.H. 67; Hutchins v. Page, 75 N.H. 215. Furthermore, our cases require that a plaintiff, be he a public official or not, must prove by a preponderance of the evidence that the libelous statements were defamatory of him and also the extent of the damage which they caused. Chagnon v. Union-Leader Co., 103 N.H. 426, 436. Our law also demands that all plaintiffs prove that the defamatory publication applied to them. We do not subscribe to the proposition rejected in the Times case that "an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." New York Times Company v. Sullivan, 84 S. Ct. 710, 732.

The Trial Court correctly charged the jury on all these applicable principles of law. The instructions did not require the defendant to prove the truth of a privileged communication if it was made with good motives and reasonable belief of its truth. We have ruled that the record contained sufficient evidence to warrant a finding that the plaintiff has sustained his burden of proving actual malice by the defendant. We find no conflict with the Times decision.

Defendant's motion to set aside the verdict as excessive was denied by the Trial Court. We set out in Chagnon v. Union-Leader Co., supra, 446 the standard for our action in the circumstances: "The consideration of the defendant's motion involved questions of fact for the Judge and his decision will not be set aside unless no reasonable person would make it . . . . In most jurisdictions the view is taken

that the Trial Judge, because of his more favorable position to determine the weight of the evidence and assess all the circumstances involved, may more freely interfere with the verdict than the appellate court and that his decision upon this question will be given great weight in passing upon the question on appeal." We also stated therein that the verdict in this case "must be assayed in the frame work of our rule that 'when the element of malice enters into the wrong a more liberal rule of damages prevails.' " Id.

The evidence showed that the plaintiff's earnings increased from a low of $7,150 in 1954 to about $8,000 in 1958 which was his rate of pay at the area when his employment was terminated effective July 10, 1959. His life expectancy was shown to be 15.44. He was 61 at the time of the trial in 1963. His earnings for 1960 were about $300, for 1961 they were $6,491.82 and $5,994.50 for 1962. From the evidence the jury could find that but for the defendant's libel the plaintiff would probably have secured employment at $8,000 per year in the ski or motorcycle industry or in similar lines of work. He had experience in public relations with the motorcycle industry and in managing a ski area. Consequently the jury could properly find a loss of earning caused by the libel of $7,000 in 1960, about $1,500 in 1961, and $2,000 in 1962 for a total of $10,500.

According to the evidence the effect of the article still continued at the date of the trial in April, 1963. "When Mr. Baer's name was mentioned, this fact of him being fired or let go from the Area came up at the same time." The jury could properly find as the natural and proximate result of the publication probable loss of future earnings for at least four more working years (to age 65), which on previous figures could amount to $6,000 or more. Chagnon v. Union-Leader Co., 103 N.H. 426, 441.

When as in this case, the jury could find that the

defamatory publication charged the plaintiff with a crime or with activities which would tend to injure him in his trade or business, plaintiff can recover for damages to his reputation resulting therefrom. Id.

Lastly there was evidence from which the jury could find actual malice on the part of the defendant and could award damages for mental distress and vexation which cannot be made the subject of exact pecuniary compensation. Restatement, Torts, s. 623. Also on a finding of malice a different and more liberal rule of damages prevails, that is, the jury is to "endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay." Bixby v. Dunlap, 56 N.H. 456, 464. We cannot say that the jury verdict did not come within that norm or that the Trial Court acted as no reasonable person would in refusing to set the verdict aside. Witsutskie v. Malouin, 88 N.H. 242, 246.

We consider next defendant's argument that the Trial Court should have permitted the introduction of evidence as to the disposition of a libel suit brought by plaintiff's son against the defendant based on the same article. This suit had been marked "Voluntary Nonsuit." The Trial Court instructed the jury that any other lawsuit arising out of this article and the disposition made of it has no bearing on the issues before them and should be disregarded. We see no error in this ruling. Saykaly v. Manchester, 97 N.H. 4, 5; Masterson v. Berlin Street Ry, 83 N.H. 190.

Defendant also excepted to the refusal of the Trial Court to admit evidence of the bringing and disposition of a suit brought by the plaintiff against the publisher of the newspaper in which defendant's column appeared. This action was settled for $2,000 on a covenant not to sue. The Court properly excluded this evidence and the amount

received should be deducted from the verdict returned in the present action. Masterson v. Berlin Street Ry, supra; Martel v. Wallace 83 N.H. 276, 279; Burke v. Burnham, 97 N.H. 203, 212.

Judgment on the verdict.

KENISON, C.J. concurred in the result; the others concurred.

CHARGE TO THE JURY

(VOL. V, pp. 139-163)

GRANT, J.: Mr. Foreman, members of the jury, I'm all in favor of short charges, but due to the relative novelty of this type of case and the fact that I think also it is the first civil action of this term, I am afraid that I might have to take a little bit longer in my charge than I might otherwise. Incidentally, before I get into the charge, I want to tell the jury, as counsel have, that I think you have been very attentive, and also I would like to compliment the attorneys on presenting a complicated case to you in a competent fashion with a minimum of friction.

First of all, I want to call to your attention strictly that you are not to decide this case out of sympathy for one side or the other. Sympathy should play no part in your deliberations whatever. You should decide the case strictly on the evidence that has been presented to you and in accordance with the law which I shall give you as the second part of the charge. It may be that you disagree with the law, but the only place where that can be changed or remedied would either be in our Supreme Court or in the General Court in Concord.

During the course of the trial I have been called upon with some frequency to make certain rulings of law, and you have heard me rule on the admission or exclusion of

certain evidence; and I want you to know that in this case, as in all others, that these are merely rulings of law and you should not try to speculate or guess by any of my rulings how I would decide the case. In other words, don't sit there and try to pick my brain, because how I would decide the case is no part of your consideration whatever. You decide the case strictly on the evidence that has been given to you in the form of oral testimony and written exhibits. As you know, I am completely impartial. The Court is completely impartial in this and all other cases. Therefore, try very hard not to take any of my charge out of context. If, for example, I should restate something a couple of times, it might be either out of inadvertence or because I had forgotten that I had already given it to you or because I might feel it is a little complex, extraordinarily complex, and I want to make sure you have it accurately; but please do not assume that I am giving you any secret course of action to follow based on anything that I might feel in the case.

It is your duty, Mr. Foreman and members of the jury, that you take your own recollection, not from what counsel have suggested in their arguments — I am not saying that they were improper, but you just take your own recollections of what the testimony was; and it might be that among yourselves there might be some disagreement, but I am sure if you talk it over impartially and dispassionately that you can come up with what the testimony was. It might be a little more difficult for you to decide what the import of the testimony is, but at least I am reasonably sure you won't have any difficulty in recalling what in fact the testimony was.

In deciding these cases, in deciding what the facts are — and again I want to impress on you, first find out what the salient, important, underlying facts are — and in deciding what those facts are, you have to bear in mind

the credibility of the witnesses, that is, to determine who is or who is not telling the truth, or what prejudice or what bias or what slant any particular witness might have toward the outcome. A person may testify about something which is not true and yet he may be perfectly honest about it. Consider all aspects of what the witness said, who he is, what he is in the case, what if any motive there might be in his mind, even a subconscious motive. We're all impelled to act and react in certain ways. Sometimes we don't even know why. So consider the witnesses and the part that they apparently play in this little drama that we've had put forward during the last week and a half. You can consider their demeanor on the stand, you can consider whether they seem to be evasive, you can consider their ability, or apparent ability, to express themselves freely, and also whether or not in your mind they knew what they were talking about.

It is quite apparent that a person could give terribly misleading testimony and be very honest about it because he might not know what he's talking about. On the other hand, you could have a witness that knows all about his subject matter and be fairly inarticulate and quite unable to discuss it with you or to answer questions in a straightforward and acceptable fashion.

I think counsel on each side has correctly stated to you that there is no particular ownership of witnesses or of the evidence. Once a witness takes the stand and the testimony or evidence goes in, it may be used for or against either party, no matter who puts the witness on the stand or who brought out whatever particular evidence or testimony is sought to be elicited from that witness.

Also, Madam and gentlemen, you don't have to believe anything that you heard from the stand. You can accept completely what a witness says or you can reject completely what a witness says, or you can be a little

choosy about it. You can accept some of it and you can reject some of it.

In other words, what I'm trying to say — and probably not very artfully — is that you weigh the evidence. That's a phrase that I think is descriptive. It's one that we lawyers use. You weigh the evidence. Some evidence is more persuasive than others, some has a greater part to play in the determination of the facts than others. I'm sure that you have that same mental process practically every day in your own affairs. You listen to other people. You see other people. You talk to them. And you decide what they say is true or untrue or how much credibility you give to them, how important what they say is in the determination by you of your course of action. Consider this case, important as it is, as you would any important matter in your own life, business or social, in arriving at a conclusion.

I believe that I have told you before, some of you at least, about the burden of proof; and in other cases that we've had I think, again recalling to your mind that they were criminal cases, you will recall that the State had the burden of proof and it had the burden of proving beyond a reasonable doubt. This is a civil case, and the plaintiff who has brought the action and who has the burden of proof has a somewhat lesser burden. He has, still, a burden of proof, but he has to prove his case on what we call the balance of probabilities. We don't adopt the — well, let me put it like this: The fact that somebody has brought a writ does not mean under our system that he is entitled to a verdict. He has to prove his case. But we do not adopt the practice of allowing somebody to come into court and make a claim and then sit back and require the other person to disclaim or to prove that the claim is not true. The one making the claim has the burden of proving it. Otherwise, he has to have that issue determined

against him. As I have said, he has the burden of making it appear to you that his case is a little more probable than otherwise and that his contention is the correct one.

I think that we judges frequently bore juries in a long term when we come before them frequently by giving them the homely but very useful illustration of a scale. When a lawsuit starts, the scale is in equilibrium, it doesn't tip one way or the other. When the case is over and all the evidence is in and you have heard the arguments and the charge, if you find on the balance of probabilities that the balance has been disturbed and it tips in favor of the plaintiff, then he has sustained his burden of proof and your verdict would be for the plaintiff. Obviously, if it tips in favor of the defendant, you would give him the verdict; and if you can't make up your mind, if it has just retained its equilibrium as it started, the plaintiff would not have sustained his burden of proof and you would find against him.

Speculation or guesswork has no part in your determination here. Sometimes it is hard to keep away from it, but I think that if you conscientiously keep your mind on that injunction of mine that you will come out all right, because we have rules of evidence that we try to adhere to and live up to, and it's perfectly, patently wrong and quite improper if you resort to speculation or guesswork in the determination of any of the facts or issues in this or any other case, and it would be unfair to the system and it would be unfair to the parties in the case.

I think that pretty well takes care of the first part of my charge, Mr. Foreman and gentlemen, which has to do with the procedure that you follow. In other words, you have heard the case, you've heard the evidence; the determination of the facts is entirely yours. You come to the facts by reviewing the evidence among yourselves, by reviewing the candor of the witnesses, the quality of the

witnesses, as I have suggested, and you then come up with your decision as to what the facts probably are; and then, having done that, you consider the law, and, of course, you consider them both before you can come to a verdict.

The authorship of this article that Mr. Baer complains against or about has not been denied; and I think as a matter of law I can tell you, accurately, that it was published. Mr. Baer says that it is a defamation, and a written defamation is what we call a libel. So he says that it is a libel. Mr. Rosenblatt admits the authorship of it, but he denies that it is defamatory of Mr. Baer. He denies that it even refers to Mr. Baer or that it was so intended and that reasonably it could not be considered by reasonable people to have reference to Mr. Baer and therefore that Mr. Baer is not entitled to a verdict.

A defamatory publication may be justified if it was published on a lawful occasion and in good faith and for a justifiable purpose and was true or was published on a reasonable belief of its truth. Defamatory matter which constitutes comment rather than fact is justified if made without malice and represented fair comment on matters of public interest and is based on facts which are either true or reasonably believed to be true.

Mr. Rosenblatt says here that it didn't refer to Baer, it wasn't defamatory, and that in any event it was of privileged or justifiable nature because it dealt with a matter of common public concern to the people of this area, this city and this county, if not beyond the county.

Mr. Baer has the burden of proof, as I said, as plaintiff here, to show that it was a defamation and that it applied to him. The burden of proving any privilege, however, or justification — and I might use the words interchangeably, but if I should, just consider that I mean a privilege, a

qualified privilege — is up to Mr. Rosenblatt, and he has to prove to you on his defense of privilege that it was published on a lawful occasion, that it was published in good faith, it was published for a justifiable purpose and with a belief founded on reasonable grounds of its truth.

The nature of the article I think I should call to your attention. It almost, in a way, is divided into two parts. You will have it before you. It starts out about having done some checking around with some reference to a rather astounding difference in income in a particular period of time. I'm not going to dwell on that because you have heard quite a lot about it and you are going to have this before you in the jury room; but the first part of what Mr. Rosenblatt published, what he wrote, is of a factual nature. The second part — and this is the part that is claimed to be defamatory and libelous — was the question about what happened to all the money last year and every other year. The truth, or accuracy, the falsity or the untruthfulness, of the facts, as I've called them, the first part, do not determine, by themselves, whether or not there was a libel. In other words, you don't have to find that this was true or was untrue or was factually accurate or not in order to find that there was a libel. However, and I'm charging you seriously on this, it should be and must be part of your deliberations in determining the state of mind of Mr. Rosenblatt and whether or not he acted in a proper fashion in writing this particular question, or posing the particular question. It is an important part of your consideration, but you do not have to prove the falsity or the inaccuracy of the factual reporting in that column.

The first issue in the case is whether or not the language in the article, or any part of it, was used in a defamatory sense and was so understood by the readers. As I said, Mr. Baer has the burden of proof on this issue because he is the one that makes the claim, and he must

make it appear a little more probable than otherwise that the language was used by the defendant in a defamatory sense and that it was so understood by the readers of the column; and unless the plaintiff so satisfies you that it is a little more probable than otherwise that all, or some part, of the language in the article was used in a defamatory sense and was so understood by the readers, then you should return a verdict for the defendant, and that's the end of the case.

You should understand that it must be used and understood in a sense which is derogatory or defamatory of the plaintiff himself, Mr. Baer. Of course, there can be no responsibility imposed on Mr. Rosenblatt for any of the language contained in the article which was not used or understood in a defamatory sense as to the plaintiff. To render a defamatory statement actionable, it is not necessary that the charge be made in a direct or positive or open fashion. If the words used, when taken in their ordinary sense, convey a degrading imputation, no matter how indirectly, they are libelous, and it matters not how artfully their meaning is concealed or disguised.

An insinuation of a crime is actionable as a positive assertion if the meaning is reasonably plain and clear, and the putting of the words in the form of a question does not change the liability of the defendant if the form and sense of the question is defamatory or derogatory. Now, an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable. It is sufficient if Mr. Baer, the plaintiff here, proves on the balance of probabilities by his evidence that he was one of a group upon whom suspicion was cast, and the fact that others in this group might also have been libeled is not a defense; but Mr. Baer has the burden of showing that the defamation, if you find that there was one, either was directed to him or could have been as one of a small group.

Any written words which directly or indirectly charge a person with a crime or which tend to injure his reputation in other ways or expose him to public hatred or contempt or ridicule are defamatory. A publication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter other persons from associating or dealing with him. A defamation, a defamatory publication, may consist of a statement of fact or a statement of opinion based on assumed facts, or it may consist both of statements of fact and statements of opinion based on assumed facts, either stated categorically or in the form of a question.

A publication which imputes to another a criminal offense is defamatory, and cheating or attempting to cheat or defraud is in this state a crime. Publications which state or infer that another has cheated or taken unfair advantage in a business transaction are defamatory, and publications which impute to another conduct, characteristics or a condition incompatible with good, proper conduct in one's lawful business, trade or profession or of his public office, are defamatory.

In considering, Mr. Foreman, Madam, in considering whether the language in the article was used by Mr. Rosenblatt in a defamatory sense, you should consider all of the publications of the defendant and all of the other evidence here, all the other exhibits which are in evidence, including the article complained of, all the facts and circumstances surrounding the publication, and all of the evidence, as I've told you, presented to you during the course of the trial which have not been expressly ruled out by me or restricted as to their use. The words involved here should be given their plain and ordinary meaning according to the sense in which they appear to have been used; and you may consider — in fact, you should consider what the

ordinary person would take them to mean. The article complained of here should be considered as a whole in determining what it, as a whole or any part of it, was intended to mean and how it would reasonably and normally be understood. You may consider all proper inferences to be drawn from the evidence which has not been otherwise restricted by me in determining in what sense the defendant used the language employed.

As to how the language was understood by the people who read it, the testimony of the readers may be considered as to how they understood the language, but this does not mean that you should use this evidence in determining how the defendant used the language but only in determining how it was understood by those who read it. Various persons were allowed to come in and give their sense of the article, which is proper, but it is only as to how they understood it and not to be used as how Mr. Rosenblatt intended it to be used.

If you find that the language in the article, or any part of it, was used in a sense which was defamatory of the plaintiff and that it was so understood by the readers, people who read it, then you may go on and consider the other issues in the case as to those parts of the language only that you found were used in a defamatory sense. If you do not find any part of the language was used in a defamatory sense or was so understood by the readers, or some of the readers, then you should return a verdict for the defendant, and that would be the end of that.

Now, as to any part of the article which you, if you do, find defamatory, and that Mr. Baer was intended, or he with a few others was intended, he and a small group, if you find that it was derogatory of him and charged him with a crime, held him up to scorn and ridicule, that he was the fellow, either singly or in a small group, then you can go on to consider — and you should — whether the

publication was privileged or justified; and I think I pointed out to you that the law is that a conditional privilege, which is claimed here by Mr. Rosenblatt, is established if the facts, though untrue, were published on a lawful occasion, in good faith, for a justifiable purpose and with a belief founded on reasonable grounds of their truth. This burden, as I think I've pointed out to you, of proving privilege or justification is upon Mr. Rosenblatt; and to justify the publication of this matter, if you find it was defamatory, Mr. Rosenblatt must prove two things. First, that the article was published on a lawful occasion, that is, in good faith and for a justifiable purpose; and second, that what was published was founded on reasonable grounds for belief and on reasonable grounds. Failure to prove either one of these requirements will subject the defendant to liability for the publication of the matter if you find it to be defamatory. Proof of both of these, however, will justify the publication and will relieve the defendant from liability.

Consider, then, if the article was published on a lawful occasion, that is, in good faith and for a justifiable purpose. Under the constitution of New Hampshire and the constitution of the United States, there is a guarantee of the freedom of the press and the right to expression. It's a very salutary right, it's fundamental, and it should be carefully preserved. These constitutional safeguards, however, do not exempt people who publish statements or comments from the law of libel; and the imposition of responsibility for libelous publication has been held not to endanger the liberty of the press.

In other words, the right of free speech and free press and the right publicly to express your opinion has its limitations. It is not an unlimited right. And the right to self-expression or comment, even on public matters, can be used in such a fashion as to be without justification or

privilege. It depends how it is used. The fact that the defendant used the local press for publishing his column does not put it in any different class from anyone else nor does it exempt him from the consequences of damage done by unjustified or unexcused libelous publication. Newspapers have the same right to give information that others have but no more, and the occasion of the defendant's publication of this article was not lawful if the end sought to be obtained was not to give useful information to the community of facts which the community had the right to have and of which it should be informed in order that they might act upon such information. In the defendant's vocation, however interesting it might be, or the information might be, the defendant still has to show a lawful occasion for the publishing of the defamatory material even if it is true.

Now, a lawful occasion I think I should try to explain once again. A lawful occasion exists only if the community had an interest which should be protected or promoted by the publication or which the public had a right to be, or ought to be informed of in order that it might act upon correct information, and then only if the defendant acted in good faith and for this purpose.

Everyone, including Mr. Rosenblatt or the newspapers, has the right to call the attention of his fellow citizens to facts and circumstances of public interest if his real motive in doing so is to bring about a reform or to give useful information to the community or to those who have a right to know or ought to know in order that they might act on the information. This is a justifiable purpose. If, however, there is merely a color of lawful occasion and the party instead of acting in good faith assumes to act for a justifiable purpose as I've defined it merely as a pretense to publish defamatory matter, there is no lawful occasion and he is liable in the same manner as if the pretense had

not been resorted to. To have a lawful occasion, therefore, the matter must have been published in good faith and for a justifiable purpose.

The existence of malice prevents the existence of a lawful occasion. I will define malice in a few minutes, but at this point by malice I don't mean only ill will or evil motive or intention to injure but a wanton disregard of the rights of others and the consequences likely to follow from it.

In considering the motives of the defendant in this matter, you may consider the article itself, the language used in the article, the manner in which it was displayed in the paper, the nature of the subject matter, public nature of the work, and all the surrounding circumstances, which are important in practically any case in determining either what was done or how it was done or why it was done. The surrounding circumstances or the attendant circumstances are very important in this case, and, in fact, for that matter, in most cases.

In considering whether the defendant acted in good faith, you may take into consideration whether the defendant was reporting what others said and whether or not he had reason honestly and accurately to believe the accuracy, the substantial accuracy, of the matter published, and any other facts tending to show good faith.

You are entitled, I think, to find that the public had a right to be informed about any difficulties or discrepancies in income or thievery at this public area. It's in the public domain. It's public property. They had the right to know what was going on, even if the governmental officials were capable of solving any difficulty that existed there. Keep in mind that the public has a right to know how their public affairs are being conducted; and that, as I say, gives rise to this qualified privilege which I have now told you about on two different occasions in giving

you what is required to sustain the privilege, because the privilege is not an unlimited one. It can be lost by an abuse of it. It is the publication of defamatory matter without justification that imposes the responsibility. The defendant must justify the publication by proving this lawful occasion, as I've said, and a reasonable belief that the statements so published were based on reasonable grounds. It is not enough to show that the defendant actually believed the source of his information to be true. As I have indicated, such belief must be founded on reasonable grounds and on grounds that would satisfy the ordinary man of average prudence.

I think I have sufficiently developed that. Mr. Rosenblatt said it's not defamatory; Mr. Baer said it is. Mr. Rosenblatt said he didn't mean Mr. Baer because he didn't mention him by name; Mr. Baer makes the claim as part of his case that he couldn't mean anybody else, or if it could mean anybody else it included him because he was one of a small group; and as I said, the law is that it is no defense merely because the defamation, if you find there was a defamation, could reasonably have been extended to other persons, persons other than the plaintiff himself.

Now I shall proceed to the question of damages. First of all I want you to consider the facts, what you consider the important, real, basic facts here, and consider those facts in the light of the law as I've given it to you. If you then, on the facts that you find and in conjunction with the law as I've given it to you, find that Mr. Baer is not entitled to a verdict, why, that's the end. If you find, however, that he is entitled to a verdict, then you go on to the question of damages, but not until you make the first decision. In other words, you do not, in this or any other case, come to the question of damages until you have decided the question of liability.

As I have said, insofar as any part of Mr. Rosenblatt's

publication imputed to the plaintiff and a criminal offense or actions which tended to lower his reputation for truth or honesty or tended to affect him in his trade or business, it is a libel; and there is a peculiar or, rather, different rule of damages in a defamation case, a libel case, because no proof of damages is required but the plaintiff is entitled to recover without any proof thereof all damages which would normally result from the defamation. These are called general damages.

The man in an automobile case, for example, has his damages. He has his special damages, his hospital bills and all that sort of thing, and then any loss of income or pain and suffering, but he has to prove those. Now, if a plaintiff comes in and proves a libel, he doesn't have to prove special damages. He is entitled to what we call general damages. And general damages, which may be recovered without proof, are such as would normally and proximately and necessarily result from a defamation, which would include injuries to feelings or to reputation.

In considering what to award in the way of general damages, you may consider the character and reputation of the plaintiff as you find it, and in this particular case it is presumed to have been good before the publication because there is no claim or any evidence to the contrary. You may also consider his general standing in the community, the community in which he generally circulated, and the character of the defamatory publication and its probable effect on the man himself, its extent and duration, and the fact that the plaintiff was a business man. You may consider any injured feelings and mental distress that you find probably resulted from the publication. On that point I'd like very briefly to mention the granddaughter. She is not a plaintiff here. She is not seeking nor is she entitled in these proceedings to any compensation whatever for whatever you find may or may not have

happened to her out at her school; but you may consider that as part of any injured feelings or mental distress on the part of Mr. Baer.

Any amount to be awarded under general damages may include any future damage that you find would probably occur normally from the publication.

The recovery by the plaintiff of any other elements of damage other than those which are included in general damages requires specific proof by the plaintiff who has the burden of proof on this issue; and he must make it appear a little more probable than otherwise that each element of special damage claimed probably resulted from the publication.

In considering the question of special damages to the extent that the defendant has — I want that stricken. I don't think that has any application.

In other words, if you find a libel, without proof of anything more, the plaintiff is entitled to general damages as I've outlined them to you. Any special damages, however, require proof based on probabilities, and I'm not going to dwell on it. I don't want to take it out of context here, but Mr. Baer claims, and I think you've heard his counsel argue, that he lost either a specific job or that his earning capacity was lessened to the extent claimed by counsel in his argument. Those would be special damages and would require proof based on probabilities.

I believe in this case, and I'll be corrected by counsel if I'm misstating it, I don't believe there was any claim for any medical expenses. Is that so?

MR. BROWN: That is correct, your Honor.

THE COURT: There are no claims made here, Mr. Foreman, Madam, gentlemen of the jury, for any medical expenses or for illness; but you may consider any mental anguish or suffering which you find probably resulted from the publication.

There is another element that I feel that I should comment on, and that is the question of malice. I told you a few minutes ago that I was going to define malice more particularly than I did when I passed over it. This issue should be considered on the question of damages, and on that issue also the plaintiff has the burden of proof.

If the article was published with malice, there is a more liberal rule of damages than there would be otherwise. Actions for libel are designed not only to furnish some indemnity to the person libeled so far as money can do it for the injury inflicted but to vindicate the character of the person unjustly assailed and to protect him against the repetition of the wrong. The question is not only what is proper for the injured party to receive for the wrong done but what may be just under all the circumstances that the defendant be required to pay; and where malice is found, with the burden of establishing it on the plaintiff, where malice is found, more severe damages are authorized than when malice is absent.

As I've stated already, I think, the defendant is chargeable with any malice — no. Strike that, Mr. Sheehan, if you please.

We have done a lot of talking about malice. Now, Judge, what is it? Malice, as used in this connection, means ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others. Malice does not necessarily require ill will to be proved, or evil motive, although such would constitute malice; but malice may consist of the intentional publication of defamatory matter with a reckless disregard for the rights of others, and it may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another, regardless of the consequences, even though there is no actual intention to hurt or harm an individual.

In considering the element of malice, you may consider all of the evidence in this case which has not been specifically restricted in its application or kept from you. You may consider the relationship of the parties, the circumstances and terms of the publication and all of the surrounding and attendant circumstances. In the mitigation or lessening of damages on the question of malice, you also may consider whether the conduct of the plaintiff was such as to create a reasonable suspicion of the truth of the matters charged against him in the publication. Unless you find that the defendant here published the article in question with malice, then you may not consider the more liberal rule of damages. If, however, you find that the article was published with malice as I have described it to you, legal malice, then you may apply it, apply the more liberal rule of damages as I have explained it to you.

We have a saying in the law that the burden of proof does not shift. It does not shift. Mr. Baer has the burden of proving that he was the person defamed and that the publication was defamatory. If you find that that is so, then you may apply general damages. If you find that is so, you may also find special damages, but that requires proof on the balance of probabilities, and Mr. Baer has that burden. If you find that there was a defamation, that there was a libel, you also may go on to determine whether there was malice as I have described it to you. On that question of malice, Mr. Baer has the burden of proof. On the question of whether there was a qualified privilege because of the public nature of the subject matter discussed here, Mr. Rosenblatt, the defendant, having raised that as an affirmative defense in his own behalf, has the burden of proof on that issue.

Mr. Foreman, you will have here a verdict blank. I don't know whether you have seen one of these this term or not, sir. I don't think you have. If you find for the

plaintiff, you sign your name on the top section where it says "Plaintiff's Verdict" and write out in words the amount of the damage, the dollars. If you find for the defendant, you merely sign your name on the defendant's portion of the blank.

ARTICLES IN

LACONIA, NEW HAMPSHIRE EVENING CITIZEN

WRITTEN BY ALFRED D. ROSENBLATT

ON SUBJECT OF BELKNAP AREA,

AND OTHER ARTICLES REFERRED TO THEREIN,

AND INTRODUCED AS EXHIBITS

IN THE CASE OF BAER v. ROSENBLATT

Plaintiff's Exhibit #24 12-11-58

OUT OF MY HEAD

By Alfred D. Rosenblatt

That Belknap County Recreation Area big headache no secret. Nobody satisfied with it. Not Fritzie Baer, the manager, not the County Commissioners who run it, not skiers who use it, not county legislative delegation. Many solutions been offered and I not have any additional to offer except suggest recent report by legislative delegation committee which suggests creation of an "authority" is perhaps best idea yet. Big hole in their recommendations for "authority" is that members of authority not slated to receive any salary. Since this almost a full-time job, do not consider this practical arrangement. Even if you get good men and women accept appointment for one term they probably could not afford to accept reappointment. Be better to offer good salary and attract capable people who would then be eager continue.

One thing for sure, nobody ever going to be able to run it any better unless some very large capital investments be made. As is now Area has never made dime profit. If properly run could pay all of the county's taxes and have good chunk left over to spend on schools. Present commissioners have to face facts. Either they do something and do it quick or pretty soon, one of these years, Area not just going to break even but show fifty or a hundred thousand dollar loss. If commisshes allow that to happen they better buy some asbestos suits or make reservations first moon rocket.

Following excerpts from article by friend Roger Tubby in New York Times self-explanatory. Hope make people realize what can really be done, Roger knows what talking about. Is Editor of Saranac paper, former press secretary Democratic National Party, was my boss in Chicago, when worked on Adlai Stevenson newspaper.

Roger says:

By Roger Tubby

WILMINGTON, N.Y. — There were skeptics among Adirondack hotel and resort people a year ago when New York State was rushing to completion the new $2,000,000 ski development of Whiteface Mountain. It was doubted that it would have much of an impact on the economy of the surrounding area. They were so wrong.

To be sure, it had been expected that the village of Wilmington would benefit, nestled as it is at the base of the steep 4,867-foot peak. But how much spill-over would there be in Lake Placid, ten miles away? Would there be any at all in Saranac Lake, 20 miles away?

Today, it would be hard to find a skeptic anywhere in any of the villages around Whiteface. Instead, many hotels and motels that were closed for the winter year ago are staying open for the new ski season. Additions

have been made. New motels have been built. One of them, in Lake Placid, Shore Cove, is racing toward completion before Christmas.

Even in Saranac Lake, the 100-room Hotel Saranac is booked almost solid through the winter with bus tours of skiers. In other years it rarely had ski guests, Saranac Lake, Ausable Forks, Keenseville, all have benefited.

Of course Wilmington has felt the effect of Whiteface boom most. And it is not only a winter but a summer boom, for last summer over 50,000 visitors rode the 10,400-foot double chair lifts, the longest in the east, to enjoy the spectacular views along the way and at the top.

Hostelries Enlarge

Sportsman's Inn, between the new ski lodge and Wilmington, was jammed with skiers last winter. Today the inn is spending $50,000 for a new Bavarian Room, a new dining room, and enlarged overnight accommodations. Four motels and inns in Wilmington are simultaneously enlarging and adapting their premises for skiers.

In Lake Placid, the Town House has a substantial addition, the Chalet House has been expanded, the St. Moritz Hotel will be open for the first time throughout the winter.

The ski lifts themselves took in over $100,000 during the winter season, an income nearly double what was expected for the first season.

Whiteface added over a month of profitable operations for hotels, motels, restaurants and business places in the area before it was finally closed on April 15. In March the Bank of Lake Placid reported an increase of $250,000 in deposits for the month, 20 per cent more than the previous year. The Chamber of Commerce for that village reported a phenomenal increase in business for restaurants.

With most skiers coming into the area by car, Glens

Falls, Plattsburgh, Tupper Lake and other communities along the way got business they had not had before.

Land Value Soars

Now, there are winter accomodations for over 600 in Wilmington and 4,500 in Lake Placid. Several American and Canadian ski clubs have rented private homes for the season in and around Wilmington. Indeed, it is reported that the value of some land there has doubled since the new project was opened.

Open your eyes doesn't it? Makes you see what can be done here at Belknap with less competition, more natural advantages, easier-accessible location to Boston, Providence, even New York City.

If I were hotel or motel owner would bend every effort to persuade Lakes Region Association, Weirs Area Chamber of Commerce, Winnisquam Scenic Association to knock themselves out getting similar thing done at Belknap.

Plaintiff's Exhibit #25 12-16-58

OUT OF MY HEAD

By Alfred D. Rosenblatt

The waiter said as he looked scornfully at the 12 cent tip for a $1.20 lunch, "It's correct but it ain't right". So say most of us when we hear Fritzie Baer speak of Belknap Recreation Area as "the million dollar area". Probably worth well more than million bucks but what good does it do people of Belknap County who own it?

Truth is not worth more than a plugged nickel to us unless we happen to be skiers which most of us are not.

Pays no taxes and earns no revenue. Builds no business for hotel or motel owners or not much, and is more of a nuisance than anything else, except for motorcycle races which are of course great economic boost for entire region.

This please is NOT criticism of Fritzie as manager. Think that man one of greatest "promoters" ever knew but poor guy's hands hogtied by complete lack of capital for making real improvements. Only money he ever get is what is expected he will bring in and that's like buying a vacant house lot and expecting rent without building a house on it. Can't be done. By Fritzie or anybody else and guess by this time Fritzie justified in giving up trying. Would discourage anybody.

As matter of fact town of Gilford very forbearing in my opinion for standing for situation. If were privately owned at least town would get large amount real estate taxes. As is, get very little if anything and resort owners, lots of whom are in Gilford, get very little too. Gilford residents except very favored few don't even get free skiing.

Reason for mentioning area so soon after only few days is because received much comment on excerpts of recent New York Times article by Roger Tubby which explained what tremendous results obtained in Whiteface, New York State. Trouble is most of comment, although largely favorable, did not offer any original solutions other than agreeing that large capital expenditure necessary.

Another complicating factor is that of five-man committee who wrote legislative delegation report only one (Marion Lord) survived the recent election. Other four lost and therefore cannot help in legislature to implement recommendation of creating an Area Authority. New electees have to learn situation first before can have informed opinion.

Incidentally copies of that report scarce as hen's teeth.

Respectfully suggest to delegation that numerous copies made available to all interested parties to read. Now at height of winter be good time stir up interest, action.

Would also be good idea for people of Belknap County to go to Area and see what it's like. Will open your eyes to squalid conditions existing. Dining room so-called so beat-up, old, unpainted, even dirty, is disgrace. Whole interior of main building look like Hoovervilles of depression days. Why should anybody from out-of-town come to Belknap when brand-new, beautiful, places available for trouble of driving only few extra miles?

As for ski-slopes and skiing conditions, I know nothing. Am complete ignoramus. Don't even understand lingo. Don't know a Fledermaus from a Tannhauser or a Schuss from a Zeider Zee or a slalom from a Zitzfleishch. But people who do know tell me is second-rate and rapidly becoming third-rate. Tows, slopes, equipment, maintenance, far below first-class.

Seems like only solution is sell it and get rid of it or if keep, work out plan to bond and spend couple of million bucks bring it up to par.

Personal inclination is recommend bonding and spending if can be done — and am told it can — with revenue from operations paying for cost. That way am told Area will not just pay for itself but will return very handsome profit to county; enough to pay ALL county taxes and then some.

Frankly this seem like very tall order but people whose judgment I respect insist can be done. OK, let them prove it. Let county commisshes authorize several thousand dollar professional survey by firm competent people like maybe company state employs and let's find out what true facts are. Then can make intelligent decision based on facts not hodge-podge. Then can decide, keep or sell, fish or cut bait. But for goodness sake let's DO something instead just beating our gums!

Plaintiff's Exhibit #26 12-18-58 By Arthur Rothafel

Conditions at Area Good, Rothafel Writes

Editor, Citizen:

How can a publisher whose unquestioned integrity has been a fine influence in this community permit the unrestricted use of his newspaper's columns to Mr. Rosenblatt? Half-truths, distortions and downright falsehoods have no place in a reputable newspaper.

Specifically, in his remarks yesterday regarding Belknap Area, Mr. Rosenblatt tried to prove his point (namely, that Belknap Area needs considerable capital investment to make it the outstanding, year-round resort area in the East) by completely distorting the existing facts. Such total disregard of truth cannot be excused by his carefree admission that he doesn't know what he is talking about. How much better it would be were his writing based more on research and less on hearsay.

There is nothing at all "squalid" about the Area. While its dining facilities are not plush (and while they could stand some improvement) they do an adequate job of satisfying the needs of skiers. They compare favorably with facilities in all other New Hampshire Ski Area with the exception of the fancy (and very expensive) Eating House at Cranmore Mountain. Your columnist writes, "Why should any one from out-of-town come to Belknap when brand-new, beautiful places available for trouble of driving only few extra miles?" This writer challenges Mr. Rosenblatt to tell us what brand-new, beautiful places he refers to.

Slopes and trails at Belknap are not below par, as Fred would have us believe. Rather they are well above it. How else could skiing have been so excellent on so small a cover these past two week-ends? Belknap's existing equipment and facilities have been checked and approved

by the strict New Hampshire Commission on lift and tramway safety.

Contrary to implication in the column yesterday, Belknap Area does pay taxes to Gilford. And over the course of the past eight years of its operation, new trails and lifts have been added. Yet the people of Belknap County have not paid a single penny for the cost of Area operation or expansion. Yet the people of the county and their children get better skiing at lower prices than do the people of any other county in the state. After all, season tickets are available for twenty-five dollars to county residents. Children receive reduced rates through a system set up in all schools within the county.

The innkeepers who cater to skiers benefit from the Area. They could benefit more if some of them were less disgruntled, if some of them complained less and fought less amongst themselves. Unified cooperation between the innkeepers and Area management would help.

And so conditions at Belknap Area (at this time and on a comparable basis) are good. They could be better. A lot better. Our resort has scarcely touched its potential. Skiing (and camping in the summer) are among the fastest growing activities. Large sums are being spent in other areas to take advantage of this growing source of income. To keep its place in the future, Belknap, too, must be expanded.

This problem has been under extensive study by the Belknap Ski Advisory Board for over a year. Members of the board, skiers, legal experts — industrialists, engineers — men who DO know what they are talking about — have spent countless hours, innumerable meetings on matters pertaining to the Area. Through their efforts, the special committee of the County Delegation came into being. This committee conducted an intensive survey and investigation culminating in their report recommending

that the Area be put in the hands of an Area Authority with power to arrange and implement a long-range program for progressive expansion of Belknap facilities and use. A bill calling for the creation of such an Area Authority is already being prepared for presentation to the legislature.

These are facts having to do with Belknap Area. It would seem that after so many people have already put in so much time and effort — when all their work, their study, their planning seem likely to succeed — Mr. Rosenblatt's concern is belated. The distortions of facts so obvious in yesterday's column do much more harm than good.

ARTHUR ROTHAFEL
Chairman Belknap Ski Advisory Board

Plaintiff's Exhibit #27 12-20-58

OUT OF MY HEAD

By Alfred D. Rosenblatt

Thursday's Evening Citizen carried in Letter Box a letter from a real mad man who signed himself as "Chairman, Belknap Ski Advisory Board." In first part of letter fellow says reason he's mad is because I big liar when suggest that Belknap Area could stand some improvement comparison competing areas. Second part of letter agrees with me. Curious.

I called Fritzie Baer, manager of the area and asked him what the Belknap Ski Advisory board was and who appointed it. Fritzie told me he appointed them himself. Might also add here that mad fellow happens also to be paid employe of Belknap Area. Gives skiing lessons. Gets paid for it.

Plaintiff's Exhibit #28 1-9-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Listened to Fritzie Baer the other day at Chamber of Commerce and he reminded me of Styles Bridges. When Bridges makes public address he uses up every second of time so there's never any question period. Fritzie did the same thing.

Had whole bunch questions ready to ask but never got chance. So — going to ask them right now. Not necessarily of Fritzie, although of course he welcome to answer them, but of him AND County Commissioners.

Will wait few days for answers to be forthcoming via mail and/or telephone and/or personal visit and then give you, gentle readers, the answers.

If don't hear in a few days will start making calls personally for answers. If get answers will report them. If don't get answers will report that too.

Questions as follows in no particular order but just as come out of my head.

1. We are told that Area continually being improved, that gross intake being increased leaps and bounds. How much money has EVER been actually paid, not loaned, to Belknap County that county could use to cut down amount county taxes?

2. We are told that C.P.A. made out report on area operations. Where is report? May we have a copy please?

3. How is money handled at area? For tickets? For meals? For anything? Who counts it? Who deposits it? Are register tapes kept? etc., etc. Please explain system.

4. How is hiring done at Area? By whom? Are employees bonded? Are applications for employment solicited? Any requirement for residency, etc.?

5. What is payroll of Area? To whom paid? How much?

6. How are retail operations handled? Who is buyer? What is cost of merchandise purchased? What price sold for? What is average gross margin? What was beginning inventory? What was ending inventory? By whom counted? Under what supervision?

From whom are goods, services, purchased? How? Competitive bids? Locally? Out-of-town? Out-of-State? Who decides?

Who gets free passes to use area facilities? Now? In past? How are these persons selected? What are qualifications?

Are there any concessions or concessionairs at area? If so, what or who are they? How much rent do they pay? or commission, etc.?

If any readers have any other questions please let me know. Be glad to ask them.

Also be glad to have comments from anyone regarding situation. As usual no names used unless specific permission granted.

Is important to remember that asking of these questions should in no way be construed as inference on my part that anything necessarily wrong. However, we are often told that Area is "your Area — YOUR million dollar Area". If "my" Area then feel it reasonable to ask above questions as would any reasonable person be interested in business which belongs to him.

Looking forward to receiving answers and promise will be reported with scrupulous fairness and accuracy.

Plaintiff's Exhibit #30 1-12-59 (Answer of Robert F. Baer)

LETTER BOX

Bobby Baer Replies

Editor, Citizen:

Many words have been written and spoken over the last few months about the Belknap Area and sad to say few have been correct or favorable to the Area. It seems to me, that if we are to sell the Area to people outside on coming to Belknap, we must first sell the Area to the people of the County. It is hoped that the answers listed below to Mr. Rosenblatt's questions on January 9th will in part help to do this selling job. Or, at least, bring forth some support for the Area.

1. This question rather ridiculous. Eight years ago Area in desperate condition. County hired Manager Baer to put Area on self-supporting basis. Same has been done. But same would have been impossible to make these many major improvements and secure necessary equipment to operate out of earned income, and at the same time pay the County taxes.

2. If Mr. Rosenblatt or any reader for that matter will call at the County Court House, he may obtain a copy of all Area Expenditures, and Income, etc. All figures and accounts are a matter of public record. Where was Mr. R. at the last Belknap County Budget hearing? This meeting held annually to answer just these same questions that Mr. R. poses in his column, and it is a shocking fact that only an average of 30 people or so ever attend these hearings.

3. Don't believe it necessary to go into detail on how money handled, other than to say that all tickets sold as in other public areas, etc. on a number basis and records

kept on all tickets printed, sold, etc. Register tapes are kept and all departments audited by the State Auditors. Money is deposited by Manager daily, so as not to leave surplus of cash in building overnight. Not only are Area records audited by State, but by a C.P.A. hired by County delegation, and paid for by Area. Also a bookkeeper paid by Area at County Court House. All things pertaining to records, etc. were investigated by the special delegation committee this Summer looking into Area management, and perhaps Mr. R. will recall their "clean bill of health" re: Area management. If not, will be glad to furnish him with copy of Citizen in which this appeared.

4. Hiring at Area is done by Manager as should be the case. Don't quite know what Mr. R. means by residency requirements, but do know that 95 per cent of employees come from Belknap County.

5. This goes along with number 4, and while the Area may not pay the County taxes, it does give work to a lot of people, and it has paid over $55,000 in wages this year to regular and part time help. As to distribution, it would take reams to list each name and amount, but if he is interested in any particular person or persons, he can obtain same from County Commissioner's office. Again this is all a matter of record.

6. Mr. R. is again asking for the ridiculous. It would be impossible to list here in the paper the entire inventory of all departments, price we buy at, sell at, etc. We have hundreds of items for sale and it would take the entire newspaper to list them all. Again Mr. R. these questions can be brought up at public hearing to be held soon. Perhaps you should attend.

7. As to from whom are goods purchased. Practically everything purchased at Area comes from local suppliers. It is the policy of the Commissioners and the Area Management to buy locally first. Of course, there are some

items not available locally, and of necessity must be purchased elsewhere. The question of who decides must be answered with Management. Who else? That's what he's there for. To manage. Who makes the decisions at Mr. R's establishment? Items over $300 in value are put up for bid by Cty. Comm. and awarded by same.

8. The question of free passes almost sounds personal. But again, as in Mr. R's business, it is up to management. And if goodwill can be obtained through a courtesy pass, isn't it a small price? Few skiing passes are given away except to members of the Press, Radio, and TV who have done so much good for the Area, and is only good business. Ski Advisory Board members, doctors who do special ski patrol work for Manager also receive ski passes.

9. There are no concessions at the Area. All departments are under direct supervision of Area Manager. Regular suppliers such as Coca Cola, Barney's Ice Cream, etc. do help maintain stands during Annual Cycle event, at no extra cost to Belknap Area.

I have undertaken to answer these questions of Mr. Rosenblatt, not because I feel the Area is obligated to do so, but because personally, I feel they have stirred up doubts in the minds of many, and all the people of the County have a right to know the true picture. This is not an official release, but the undertakings of one who happens to know the answers in so far as I have gone. But, I do feel that the best answers to all the people's doubts and questions can best be answered by the County Comm., county delegation members, and Area management at the annual Budget meeting open to all county residents. This meeting is coming up soon.

ROBERT F. BAER

Plaintiff's Exhibit #29 1-13-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Two interesting letters in monday's Evening Citizen. One by Brenda Baer, one by Robert Baer. Cannot, of course, consider them answers to questions asked of Fritzie Baer and County Commissioners. Only fair to let them answer for themselves. Will run answers when received as promised or if not received will report that too.

Perhaps readers be enlightened by what being done other ski areas. Let's take Cranmore in North Conway. That privately owned-for-profit institution.

At Cranmore they have had a program for last 18 years which offers FREE skiing to all children till they finish high school.

Also — get this now! — children rent ski boots, skis, and poles for TWO DOLLARS A YEAR. When year is up kids turn in equipment, and next year get size larger. Only requirement is that kids must earn the two dollars.

Kids getting free skiing not required to go through rigmarole at courthouse, etc., or show picture or anything. Based on honor system.

Also kids not limited to North Conway. From any town in vicinity and radius growning larger every year.

On Monday afternoon children whose marks are satisfactory are EXCUSED FROM SCHOOL AND DRIVEN IN SCHOOL BUSES TO CRANMORE FOR FREE SKIING LESSONS BY CORPS OF TWENTY INSTRUCTORS.

As many as 500 children at a time come for lessons.

However, children may ski free ANY day of week. On weekends too provided there is no line waiting. Managing director Phil Robertson says — as reported by

Ralph Kraus of King's Grant Inn in Gilford -- that they use the honor system with the children and never have trouble.

State Planning Director Sherman (brother of Laconia's school super Ken Sherman) and State Recreation Director Russ Tobey have also instituted same system at State-owned Mount Sunapee so can see can be done by ski area whether public or private.

Why couldn't same thing be done at Belknap?

Defendant's Exhibit "E" 1-19-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Got notice in mail this week about Second Vermont State Winter Contract Bridge Championship in Burlington Saturday and Sunday, Feb. 14, 15. Interesting thing is paragraph in notice headed "Hotel Accommodations".

Hotel Accommodations

Due to the winter sports activity in this area, it would be advisable to make early hotel reservations. Winter rates at the Hotel Vermont are as follows: Single, without bath, $3.50-$4.00; single with bath, $4.25-$7.50; double without bath, $5.50-$6.60; double with bath, $7.00-$8.50; twin beds with bath, $8.00-$12.00. Excellent dining accommodations within a block of tournament. Also fine motel accommodations.

Imagine that! In the middle of February in Burlington it's hard to get hotel rooms because of skiing. Remember that Burlington only one of many Vermont towns with ski areas. Just think how Laconia with its thousands of nearby rooms could be if area was real area instead of outdated antique. Just think what we could have at Belknap if management was far-sighted and progressive instead hold-

ing back refusing even to entertain idea of real, modern facilities; real modern, business like approach.

Motel owners and hotel and restaurant operators could have all-year-round businesses, employment in area would be thousands higher all year; payrolls, bank deposits, retail sales, everything could be tremendously increased; if Belknap's potential could be utilized.

Plaintiff's Report #31 1-21-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Talking about Area questions have not yet heard from Fritzie Baer, Bill Stafford, or Joe Smith. Have series of county reports but not much information in them. Please gentlemen, let us have answers very soon. Notice not asking questions at this time from Norm Hubbard though he welcome to offer. Reason is Norm just got back on board and unfair expect him to know answers so soon.

Plaintiff's Exhibit #32 1-27-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Remember questions asked about Area on January 9 in this space? Fritzie Baer in public speech on Jan. 22 said he was not going to answer them.

For benefit of those who may not have seen questions or don't remember them here are questions in somewhat shorter form:

Asked if Area ever paid any money to county actually? Asked if could see C.P.A. report we were told was made on Area. Asked how cash was handled at Area and by whom. Asked how hiring done at Area and what payroll was and who got it and how much. Asked about

merchandise operations and details about how bought, etc. Asked who gets free passes to Area. Asked if any concessions or concessionaires at Area and what arrangements were.

Now doggone it what's wrong with those questions? Area is owned by Belknap County. Why shouldn't owners have knowledge about how its property is being managed? Why should anyone be unwilling to answer those questions? Would the answers be embarrassing?

If so, to whom?

Have searched conscience and honestly cannot see anything wrong with questions. Questions not malicious, not leading, have no built-in answers, are not "loaded". Are honest questions seeking information about property owned by taxpayers; information that should be public.

Take city for example. If want to know answers to exact same questions as above asked of Area all you'd have to do is go over to City Hall and ask Bernie Boutin or Kenny Dunlap or Dick Shelly. Get the answers in minutes. Are public property. They'd be glad to see you, give you full coop. Complete courtesy.

Or suppose you wanted similar answers from State of New Hampshire about state-operated ski areas. All you'd have to do would be go see Russ Tobey in Concord. He'd give you complete information in matter of minutes.

Have on occasion had questions to ask of Governor Dwinell, Governor Powell, Senators Cotton, Bridges, Congressmen Merrow, Bass, etc. Have never been met, not even for instant, with anything but complete courtesy and complete answers.

Yet Fritzie Baer says he will not answer.

WHY?

Can tell you one thing gentle readers. Maybe Fritzie won't answer the questions. However if he doesn't am sure someone else will. One thing for sure: Gonna keep asking them till somebody does.

Plaintiff's Exhibit #33 2-14-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Read in the Evening Citizen about the new bill to create a Belknap Recreation Area Commission. Was first time ever even heard bill being readied. Can't find anybody else who knew either. Big dark secrecy hangs over it. Seems like pretty queer goings on.

Regardless of secrecy or lack of it bill is as phony as three dollar bill and is virtually useless insofar as making Area into something worth while instead of an antique relic run for benefit of one family and favored few friends.

Provides that commission may issue bonds up to $50,000. What the heck good is that? Drop in bucket. Costs more than that just to install snow-making machinery.

Bill says county delegation may take away at end of year anything over $50,000. How can any business be run if profits are taken away and not allowed be plowed back in for expansion?

Provides for five commissioners to run area at salary not to exceed $200.00 per year. How in blue blazes can you get good people to work for nothing? This full-time job for good people. Good people just not have time to do for nothing. If not pay people to run it and not give them any money to run it with, what's the point of the whole bill? Can't do anything except perpetuate present anachronistic policies.

Defendant's Exhibit "F" 2-19-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Success of Winter Carnival brings to mind nostalgic memories of Glory that was Belknap in days when Area

was THE place to come to see wonderful ski jumping contests.

Following letter from very knowledgeable person points out why we haven't had them last few years.

Dear Fred:

In pictorial section of last Sunday's Herald was three picture spread on Laconia Winter Carnival. Two of the pictures were snapped by Earl Anderson during first carnival three years ago. Other picture was stock picture of 65 meter jump probably taken years ago. Herald caption was a little amiss. Said it was scene of Annual Juvenile Jumping meet. This not true, although have heard talk of staging junior jumping contest probably on 10 or 20 meter jump beside the Daddy-of-them-all. Not trying to make liar out of Herald, but got to thinking . . . .

Been two years since major jumping event held at Belknap. That was the ill-fated North American championship which had to be held on a Monday afternoon before a crowd of high school kids. Remember, Winnipesaukee Ski Club and Chamber of Commerce nearly lost shirt to say nothing of good will we may have lost by having to call off jump after a large number of people had paid way in. Money was refunded but Ski Club lost heart and decided not to put time, effort or money into a major jump again. Belknap management complain that C of C and ski clubs losing drive, don't promote properly, etc. Ski clubs ignore pleas and C of C have no manpower to pack slope, cart snow, plow parking lanes, officiate at jumps, etc.

Fact of matter was that Ski club devoted many man-hours to above mentioned task, plus rounding up jumpers, entertaining them, billeting them, pitching ski ball, advertising event widely and even to selling tickets at entrance to Belknap Area. Out of the take Ski club had to pay for plowing parking lanes, which some years ran into the

hundreds. And, now get this, if any money was left, a rental of upwards to $200 was to be paid to Belknap Mt. Area. Here was the rub. This is "our million dollar area — belonging to the people of Belknap County". Yet Ski club, struggling to put on a jump which used to draw thousands to Belknap, must pay rental. Like Ted Williams paying way into Fenway Park.

Yet, the Herald runs picture of ski jump. Still people talk of the jumping meets of years ago. Imagine C of C still gets inquiries about the annual jumping events. Even though ski jumping has taken a back seat to downhill events, it must still have some box office appeal. Even though we can see jumpers almost any week on TV, a big jump at Belknap would give thousands of motorists something to go to for a Sunday afternoon. Witness the cars that arrive for the jalopy races, the dog sled races. They'll gladly drop a buck or a half into a hat when it's passed.

Now it was suggested a year or so ago that Belknap subsidize the annual jump. Knock price down from $1.75 per to 50 cents a head. Use own plow for parking lanes. Let skiers walk over to jump free or for at least a very nominal fee. Pay Ski club $200 to pack, cart, officiate and run snow ball. (C of C now pay Sportsman's club to make and tend trial for sled dogs so that merchants don't have to go out in cold and tend the dogs). In other words Belknap would sponsor the jump. Ski club would do the physical work for a small fee. C of C could aid in publicizing Belknap Area would benefit from publicity, more people would flock to area. Maybe come back to ski. Lunch room would do banner Sunday business. Laconia gets name in dateline. Another sport becomes synonymous with Laconia. Ski clubs gets a little dough with which to carry on Junior Ski program. Belknap chalks it all up to advertising. Then, "your" 65 meter jump would not be

rotting away with only memories to cheer its lonely days.

(Name submitted)

Person has lot to say but think has lot of meat to it. Good meat, food for thought of all of us "owners of million dollar area".

Defendant's Exhibit "G" 3-31-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Gentle readers may recall that when House Bill 319 (sponsored by Reps. Lord, Rollins, Snow, Normandin, Ayre, Varrell, Atwood and Howe) was first announced was in opposition to it. Chief reason for opposition was fact authority to be appointed was to serve virtually without pay. Believed then, believe now, that job was too big, too time-consuming for anyone be able afford to do free.

Since that time, however, bill been amended so that Authority members will get ten dollars a day when working. Don't think this quite as good as if annual salary of 3 or 4 thousand dollars but is sufficient improvement so that can with good conscience now hope bill will pass.

Is not perfect. But then what thing human and not divine is?

County Commissioners understandably opposed to it because would take Belknap Area out their jurisdiction. Can't hate them for wanting to hang onto power! However, in view of fact that commissioners have over years accomplished very little think time overripe for change.

Bill ought to pass county delegation soon as possible so can be enacted by legislature very soon. If done in time then new Authority can at once begin exploit Area to its fullest. Winter skiing is only one facet. Untold possibilities exist in way of developing campsites, etc., at relatively little expense for summer use as well.

Area could be developed to bring many thousands of summer visitors, would be boon to all Belknap County. Could in time develop sufficient revenue to pay all county taxes, thus support County Farm, etc.

While on subject of Area think County Commissioners very politically unwise to threaten Rep. Marion Lord with political "unpopularity" for sponsoring bill. Mrs. Lord has won respect and admiration of entire county for her indefatigable efforts and intelligent approaches on all problems. Ladies of Belknap County no doubt take very dim view of efforts of anybody attempt to unseat her next time out. Chances are anybody tries it probably get licked himself. Combination of women in county plus men of both parties who think Marion Lord excellent representative be pretty tough stumbling block for anybody running again for county commissioner if voters get idea that commissioners trying dictate to members of House of Representatives.

Defendant's Exhibit "I" 5-7-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

At recent meeting of county legislative delegation was completely flabbergasted when Judge Harold Wescott got to feet, announced he was "representing the County Commissioners" Joe Smith of Laconia-Meredith, Norman Hubbard of Gilford, and Bill Stafford of Laconia. Judge Wescott then launched into speech explaining why he and commissioners opposed to House Bill 319 which would take Belknap Recreation Area out of hands of commissioners and place it under control of five-man authority.

Now under no circumstances is this to be construed as any disparagement of Judge Wescott. He is a lawyer

and a darned good one and if he is approached by a group of clients to represent him why of course he should do his duty.

However what can't figure out is why commissioners hired him? Who's paying him if getting paid? Especially with commish Smith also member of self-same delegation as representative from Meredith.

If commissioners are paying out of county funds then by what right do they do it? Was not an item in budget. Jim O'Neill is county attorney and if commissioners need a lawyer Jim is elected and paid to do the job.

If paying him out of own pockets how do they justify that?

House Bill 319 sponsored by group of members of delegation. Delegation has charge of commissioners and approves budget, etc. How can they justify engaging a lawyer to argue for them against the very people who by statute and law are their supervisors and fiscal superiors.

Are not Messrs. Smith, Hubbard and Stafford capable of making their own arguments? Of course they are.

Then why hire a lawyer?

Is complete mystery to me. Isn't it to you gentle readers?

Be glad to hear what you think.

Defendant's Exhibit "J" 5-8-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Mentioned here yesterday about puzzlement at hiring of Judge Wescott by County Commissioners Smith, Stafford and Hubbard to represent them in opposition to House Bill 319 at recent county delegation hearing. Case don't remember House Bill 319 is act which would take control of Belknap Recreation Area away from commissioners.

Wondered how Judge Wescott being paid. Whether by commissioners or from county tax moneys.

So called Comissh Bill Stafford and asked him. He said wasn't sure because had been done by Comisshes Smith and Hubbard while he (Stafford) was on vacation. Said he thought though that money would come from county tax funds. Asked him how could do that. Wasn't in budget. County delegation hadn't voted funds and that's their job. Said he didn't know. Suggested call Joe Smith or Norm Hubbard to find out.

So called Joe Smith, asked him.

Joe explained why hired Wescott. Said he and Hubbard came to conclusion bill was unconstitutional and decided people of county needed a lawyer to represent them before delegation — might add here that do not recall Judge Wescott at hearing saying bill as written was unconstitutional, but might have when was out of room. I asked him why hire an outside lawyer. County has a county attorney elected by people in person of Jim O'Neill. Why not ask Jim to act as attorney for county if one needed?

Joe told me reason didn't want embarrass him. O'Neill "had Rep. Rene Lacaillade introduce a bill for him raising his salary by 200 dollars a year. The delegation is divided on the issue and Norm and I (this is still Joe speaking here) thought it would embarrass him if he had to go before the delegation and argue on the Belknap Recreation Area".

Thought this was pretty silly. Thought didn't have anything to do with it. Couldn't see why this could be embarrassing. Told Joe so.

He said: "You're entitled to your opinion. We thought it would be embarrassing so we hired Wescott".

Asked Joe whether Judge Wescott be paid out of county funds.

Said, "Sure."

Asked him if didn't think was wasteful be paying an elected county attorney and then hire outside lawyer.

Said, "Possibly".

Asked him what Wescott's fee would be. How much would taxpayers be paying.

Said, "I don't know."

Asked him if hadn't asked Judge Wescott how much fee would be.

Said, "No".

Asked him if this wasn't pretty loose way of handling taxpayers money.

Said, "Possibly."

Asked him again pointedly: "Do you mean to tell me Joe, you and Norman engaged his services without inquiring into the cost; that you haven't the faintest idea what the taxpayers will have to pay for it? Is that the way you operate the county's business?"

Answered: "Sure. When we want something we buy it. That's all."

Had no more questions at this time so said goodbye, hung up.

Then called Norm Hubbard and asked him same questions. Fundamentally same answers. Two commisshes thought public interest ought to be represented by a good lawyer. Did not think county attorney O'Neill could ably represent them because would be embarrassed because of pending bill raising his salary 200 dollars a year.

I asked Norm if Jim had said he would be embarrassed.

Answered: "No, we didn't ask him."

That's it. Can't think of anything to add, gentle readers, except that outside of a Gilbert and Sullivan operetta haven't heard anything so funny in years; that if

anybody can throw more light on subject be glad to hear from them.

Defendant's Exhibit "K" 5-9-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

More I think about County commisshes Hubbard and Smith hiring lawyer to lobby against a bill before legislative delegation — before same legislators who sponsored and write bill in first place — more think am in some sort of Alice in Wonderland. Just think about little more.

Commishes are just that. By title are officers sworn to uphold and enforce law, not make it. Yet take it upon themselves to hire an outside lawyer — with county lawyer Jim O'Neill paid to do the job if it were necessary, and am sure ready and willing and able if it were necessary — yet hire an outside lawyer to be paid with YOUR MONEY AND MINE to appear before same legislative delegation who are responsible by law in first place for giving commishes money in budget to operate with.

If this seems little unclear and fantastic to you, gentle reader, can assure you is not misprint. Is just what happened.

Just think about this little bit more, try to equate it with other levels of government and see if can think of any other case you ever heard of that's similar.

Take State government for instance. Not even Ralph Carpenter of Fish and Game would do thing like that! Supposing state police hired lawyer WITH STATE funds to appear before legislature to argue against a bill introduced by members of same legislature.

No point drawing more comparisons. Sure you get the idea now.

Wonder what commishes would say if Fritzie Baer

were to hire a lawyer with county money to appear before commisshes to argue with them. I can just hear Norm Hubbard. Can't you? Yet Norm and Joe (note here deliberately exempting Bill Stafford because he was in Florida and had nothing to do with it) did exactly similar thing.

What do you, gentle reader, think about all this? Be glad to hear from you on it. Promise to relay information on to Joe and Norm.

Plaintiff's Exhibit #34 6-25-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Received whole bunch phone calls last couple of days. Phone calls, visits, and on-street-stoppings. So much that went to bed early with headache, leaving instructions that if anybody called, have left on slow boat for China.

General composite tenor of all calls, visits, was something like this: "Hey Bigmouth! Howcum you had nothing to say about firing of Fritzie Baer by commisshes?"

Well only reason could give and can give is don't know whole story yet.

Had lunch with Fritzie on Tuesday and got pretty good idea his point of view. However in all fairness have not yet heard the commisshes' arguments. Only thing heard so far is bunch scuttlebutt in which place no faith, like commisshes planning hire Russ Tobey and suchlike.

Pressmen making effort hold press conference with commisshes Friday afternoon at which will be asked to give reasons. When that happens — if it happens — will then be able to have two sides of story and have informed — or at least better informed — opinion.

To criticize commisshes for hiring lawyer instead availing themselves of services of county sol. Jim O'Neill is one

thing. That's cut and dried. To criticize right off cuff for firing man they themselves hired quite another.

Commisshes responsible for hiring and firing of county personnel. That their legal duty and obligation. Cannot offhand simply assume they did it without reason. Maybe they had darned good reasons. Not fair jump to conclusions without having asked them.

After all Fritzie did have substantial portion his own family on county payroll. Maybe this good — maybe not. Certainly on face of it, nepotism hardly best kind public policy.

Waters at present too muddy to see bottom. Have to wait couple of days.

Defendant's Exhibit "H" 6-29-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Am reasonably happy with answers supplied by county commisshes about plans for running area till Sept. 15. Think by and large plan ought to work O.K. for interim period.

Thing that makes me real happy is nominating committee appointed by County Delegation Chairman Walter Varrell. Walter quite obviously did lot of hard thinking before made appointments and can find no quarrel with any of people he appointed.

Case this is little obscure let me explain:

Area going to be in charge of Board of 5 commissioners beginning Sept. 15. Area commisshes have to be appointed by county delegation. Walter is delegation chairman and nominating committee am talking about is one whose job it is to pick five good people. As chairman is Walter's responsibility to pick nominating committee.

Has picked Reps. Gen. Conrad Snow, Pete Karagianis,

Joe Smith, Marion Lord, and Paul Normandin. All five these people have wealth of knowledge about area and represent excellent crosssection of county shades of opinion. Think they'll do fine job and pick good people. Mr. Varrell, as always, has discharged his responsibilities with distinction.

Now it's up to nominating committee to make wise choices and on record of past performances am sure they will do just that.

Defendant's Exhibit "L" 8-14-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Want to compliment those members of county delegation who voted last night to prevent rigging board of Balknap Area commissioners. Selections actually made are all excellent. Believe all five people will work hard and well toward making Area place all Belknap County can be proud of. (Names of new commissioners elsewhere in Evening Citizen.)

Plaintiff's Exhibit #35 8-28-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

New Belknap Area Recreation Commission now confronted with problem of hiring new manager to replace Fritzie Baer. Don't mean presume on their province and certainly will not criticize till they've actually taken over, had time to show what can accomplish.

Would like to respectfully suggest, however, that they engage fresh, new, man without any local ties whatsoever.

If pick any local person will be automatically handicapped by emotional bitternesses lingering from past. New man from out of town, with no local associations will come unsullied and with open mind. Will be able to make dispassionate appraisal of personnel without being prejudiced by personal associations and politics.

Will avoid criticism of commissioners themselves, for if hire local person will be charged — rightly or wrongly — with playing politics, paying off personal obligations, etc.

Brand-new person seems to me would be best bet.

Defendant's Exhibit "M" 9-3-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Belknap County is the only county in state of N.H. which has not yet sent out its tax bills.

What does it mean?

Means its going cost you gentle readers money.

Why?

Because is custom of county to borrow on tax anticipation basis from banks and then send out bills. Towns pay bills twice a year, retire tax anticipation notes save interest. THIS year, however, since bills NOT been sent out and towns have not paid, we continuing pay interest unnecessarily.

Why is all this?

Because the members of delegation who got licked on Belknap Area commission deal stubbornly holding it up. They trying to take what little money area has away from them. Moreover they have said publicly that in future will not give Belknap Area a dime for improvements. In short they're so sore they lost they're going to play sour grapes and throw out baby with bath water. At least

they'll try to if not stopped.

Only encouraging thing can report about whole mess is that another election next year, and when actual votes, statements etc., of some of members been made public record, am hopeful we'll have some new members next time.

If the new Belknap Area Commission decides to engage a manager and pay him $10,000 per year which is what Fritzie Baer was getting, then seems very logical that can get real top-notch person of national reputation and calibre. With that kind of money do not think Commission can merely sit back and wait for applications from local people. Most of persons eligible and willing to take job will never know about it.

Respectfully suggest that Commission seek services of top-rank executive-placement agencies in New York or Boston for assistance finding right man. Also recommend ads in such periodical as Sunday New York Times, Wall Street Journal, various recreation-trade magazines, etc.

Most important thing is not to act too hastily in fear that some great harm result if manager not appointed instantly.

Area running not badly at all under present set-up. Present personnel operating well, have high morale, doing good job. Area can get along for quite some little time yet while commissioners explore carefully and slowly.

Defendant's Exhibit "N" 11-23-59

OUT OF MY HEAD

By Alfred D. Rosenblatt

Naturally been interested in how new Belknap Area Commission chaired by Dana Beane, been doing in regards Belknap Recreation Area. So made few calls on Dana, and others, and am convinced they on right track.

New manager, Mr. Warner, getting settled very fast into complexities of job and morale of his staff, Area commissioners, etc., very high.

New baby tow going be significant improvement. New kitchen and double dining room facilities should make Area much more attractive; and know from having eaten his food in past that food supervisor Billy Schwartz-welder is superb chef who really knows how to prepare attractive, delicious-tasting food.

Only thing have to make sure now is that when commissioners apply to delegation for funds for improvements, they get them. Commissioners being extremely conscientious about spending, not letting an extra dime get spent without reason, and when are ready to make request of delegation, have implicit faith in them that will ask for what really need. Important that Belknap County Commissioners, one of whom, Joe Smith, is also on legislative delegation, don't put monkey wrench in machinery. Important not to let a member's threat to withhold funds be made good.

However, am sure that under leadership of such stalwarts as Marion Lord, Paul Normandin, Walter Varrell, Ellis Ayre, etc., delegation will do what's right. Are a few stumbling blocks on delegation but think they now realize that public would rise in rightful wrath if they tried to prevent Area growth. Think they first of all citizens and taxpayers (with an exception or two) and will not permit public's property to fail for lack of delegation cooperation and responsible action.

Plaintiff's Exhibit #10, and
Defendant's Exhibit "O" 1-29-60

OUT OF MY HEAD

By Alfred D. Rosenblatt

Listened to Highway Commish John Morton yesterday and came away with two distinct impressions. Rather, first was an impression. Second was a certainty.

Impression was that Morton deserves our sympathy. Is a man no longer young in years, trying to get along and hold on to his job, under the terribly adverse circumstances of a governor to whom reason, logic, ordinary good sense, far less important than his own political best interests; a governor who examines every problem and makes every decision on basis of what is best for him — the governor; not what is best for people of State of New Hampshire.

Certainty was that Laconia and this entire area have about as much chance of getting any new roads, bypasses, connections to Tilton, etc., as proverbial snowball in Hell while Wesley Powell is governor.

Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.

When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results?

Plaintiff's Exhibit #37 2-25-60

OUT OF MY HEAD

By Alfred D. Rosenblatt

Russ Tobey, New Hampshire's very able, dedicated, hard-working, director of recreation department has just reported that state's TWO ski areas increased their take this year for Washington's Birthday weekend from $36,000 to $40,000, or slightly better than 10% increase.

This very good, and Russ and staff deserve grateful thanks of taxpayers for good job well done.

However, take a look at Belknap Recreation Area under new setup. Don't mean take anything away from Russ or state. They been running very well for years so perhaps is no real comparison.

Just the same let's take a look at Belknap Area this year, with new commission running place as voted by legislative delegation this past year.

For Washington's Birthday five-day period last year (1959) they took in $22,000.

For similar period THIS year they took in $31,000.

That's close to a FIFTY PER CENT increase. Remember too that this is for only ONE area, and an admitted-by-all-who-are-qualified, a relatively poorly-equipped as yet, area.

Also our prices are considerably LOWER, especially for our own residents and children.

Only goes to point out, that is true what many of us been saying for many years: that Belknap Recreation Area is a potential gold mine; that could very well eventually

pay ALL of county's taxes; that members of legislature who voted for the change knew what they were doing, and deserve all of our grateful thanks for farsightedness and progressive thinking.

Defendant's Exhibit "P" 3-5-60

OUT OF MY HEAD

By Alfred D. Rosenblatt

Wonder why skiing cut out at Belknap Recreation Area Saturday night. Have heard that people who went there liked it very much, had good time, are unhappy over cessation.

Am not skier myself so don't have first-hand info but am told that many young couples miss Saturday night skiing very much, feel that value of season tickets they bought much diminished. Some have told this scribbler probably would not have bought season passes if had known Saturday evening would be cut out, and feel somewhat cheated.

Maybe Dana Beane, Jr., would like to tell us why or Jack Lacaillade, or Bill Baker, or any of commisshes. Be glad run explanation here.

Any other gentle reader with opinion also invited. No names used without permission.

Defendant's Exhibit "Q" 3-8-60

OUT OF MY HEAD

By Alfred D. Rosenblatt

Got call yesterday from Dana Beane, Jr., Chairman of Belknap Recreation Area board of commissioners, in response to query here as to why Saturday night skiing been cut out at Area.

Dana, as always, had answers at his finger-tips and presented them equably, completely, and to this scribbler's

satisfaction at least, completely satisfactorily.

Reason for cutting out Saturday night skiing is simple one of not wanting overload personnel with work beyond physical abilities to perform.

Saturday and Sunday are busiest days of week, with Sunday the heaviest. People at area work hard on Saturdays. If have to work Saturday night, are exhausted for Sunday. If were possible to substitute Saturday night with second-echelon crew, commissioners would do it. However because of slightly increased danger factor of night skiing, they feel want only first-line personnel on duty at night.

Dana says if people of region want skiing more than one night a week, (now ski only Tuesday nights) commissioners will institute Thursday night as second night.

This seems logical, reasonable explanation to me, and hope it satisfies the many people who've mentioned it. Suggest to those people who can't ski Tuesday nights or want a second night, that they make wishes known to area management via phone, letter, or personal word.

Dana says attitude of commission is that area belongs to people and that commission dedicated to making it available to people at times convenient to them, so long as consistent with safety.

Can find no fault with such an attitude; consider it part of reason why Area so successful in this, first year of separate-commission management.

What do YOU think, gentle readers?

Defendant's Exhibit "R" 3-23-60

OUT OF MY HEAD

By Alfred D. Rosenblatt

County delegation March 29 going to be asked to vote $40,000 for Belknap Recreation Area bond for new ski tow. This does not mean appropriation of $40,000 at

one fell swoop, only authority to borrow that much.

Think delegation should vote approval.

New, separate, commission has demonstrated in first year of operation that can be depended upon to expend wisely and administrate well. New ski tow will greatly improve abilities of area to handle large crowds. Chances very good that new tow will far more than pay for self; will in fact return substantial profit. Bond issue therefore would cost taxpayers nothing, would in fact reduce taxes in long run.

FINANCIAL STATEMENTS

2/3/60

Belknap Area

Information re gross Receipts
from R. Clark report year end 1958 (1)

(1) December 1958 Receipts			27,031.24
Jan. 1959 Deposits per Records			
Column Total Receipts		45,031.70	
Beginning COH	18,583.06		
Dec. Rec. deposited in Jan.	3,704.39	22,287.45	22,744.25
			49,775.49
Cash Receipts Dec. 1959			
From Receipts Register		15,062.32	
Record	35.00		
Exchange	2.00	37.00	15,025.32
Cash Receipts Jan. 1960			
Gross Receipts			51,168.81
			66,194.13

4-YEAR STATISTICS

1956	January	$ 12,661.14
	February	48,517.33
	Total	$ 61,178.47
	March	25,927.96
	Total	$ 87,106.43
	Dec. 1955	5,619.65
	Grand Total of 4 Months	$ 92,726.08
1957	January	$ 32,606.47
	February	30,023.96
	Total	$ 62,630.43
	March	3,284.06
	Total	$ 65,914.49
	Dec. 1956	15,058.15
	Grand Total of 4 Months	$ 80,972.64
1958	January	$ 27,656.46
	February	54,172.04
	Total	$ 81,828.50
	March	33,915.25
	Total	$115,743.75
	Dec. 1957	3,260.06
	Grand Total of 4 Months	$119,003.81
1959	January	$ 26,448.64
	February	43,107.79 (Carryover $5,800)
	Total	$ 69,556.43
	March 21	32,361.72
	Total	$101,918.15
	Dec. 1958	23,618.95
	Grand Total of 4 Months	$125,537.10

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FILED
SEP 22 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 38

October Term 1965

Alfred D. Rosenblatt,
Petitioner

vs.

Frank P. Baer,
Respondent

On Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF FOR RESPONDENT

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33 Am. Jur., Libel and Slander, s. 266, p. 248 39
Goodhart, Freedom of Speech and Freedom of the Press,
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1 Harper and James, Law of Torts, s. 5.27, p. 455 39
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Pedrick, Freedom of the Press and the Law of Libel: The
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Restatement of Torts, s. 598, comment a 24, 35
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Supreme Court of the United States

No. 38

October Term 1965

Alfred D. Rosenblatt,
Petitioner

vs.

Frank P. Baer,
Respondent

On Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF FOR RESPONDENT

OPINIONS BELOW

This is an action for libel and trespass of the respondent Baer, a private citizen, by the petitioner, Rosenblatt, also a private citizen, based upon a newspaper article written by Rosenblatt on January 28, 1960, and published in the Laconia Evening Citizen on January 29, 1960, which respondent claimed to have been false, scandalous, malicious, defamatory and untrue.

Trial by jury in Belknap County Superior Court in April of 1963 resulted in a plaintiff's verdict of $31,500 and motions to set aside on usual grounds (Reserved Case, 24) were, after hearing, denied. (Reserved Case, 25) There is no opinion of the Superior Court, reported or unreported, under these circumstances.

A *limited* appeal to the Supreme Court of New Hampshire (Reserved Case, 1) was argued on June 2, 1964, and decided

sub nominee, Baer v. *Rosenblatt,* No. 5211, on October 6, 1964, the order being "Judgment on the Verdict", and is reported in 106 N. H. 26. A copy of this opinion is printed as an appendix to the Petition for Writ of Certiorari starting at page 15, and again as an appendix to the Brief for Petitioner starting at page 42.

On March 15, 1965, this Court granted petitioner's petition for writ of certiorari and counsel were directed in addition to argue the question whether, at the time of respondent's employment as supervisor of the Belknap County Recreational Area, he was a "public official" under the decisions of this Court in *New York Times* v. *Sullivan,* 376 U.S. 254 and *Garrison* v. *Louisiana,* 379 U.S. 64, both cases having been decided after the trial in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of New Hampshire, Part 1

Article 12th: "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty and property. . . . But no man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. • • •"

Article 14th: "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character. . . ."

Article 20th: ". . . In all suits between two or more persons . . . the parties have a right to a trial by jury and this method of procedure shall be held sacred, . . ."

Constitution of the United States

Seventh Amendment: "In suits at common law, . . . the right to jury trial shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

QUESTIONS PRESENTED

This review is of a constitutional jury trial in which respondent's constitutional remedy for injury to his character was exercised by recourse to the common law. Only those issues which were preserved by objection and exception in Superior Court were open in the Supreme Court of New Hampshire; issues foreclosed by failure to have appealed to that Court are not open here.

We believe that the questions properly before this Court are considerably less broad than stated by petitioner in his brief, as a result of the limited nature of the appeal to the Supreme Court of New Hampshire and waivers which occurred during trial in the Superior Court.

Since the Trial Court *did* allow the defense of qualified privilege, the first question posed by both the Petition and petitioner's Brief seems to us not to be before this Court.

We believe the questions properly before the Court are:

I.

Whether respondent was a public official at the time of his employment as supervisor of Belknap County Recreational Area. We say he was not.

II.

Whether the *Sullivan* and *Garrison* federal constitutional rules should be extended to apply to this case. We say they should not.

III.

Whether there is competent evidence of malice in the record. We say there is.

IV.

Whether the Trial Court's charge incorporating the language of *Chagnon* v. *Union Leader Corp.*, 103 N. H. 426, 438, 174 A. 2d 825, 833 (1961) *cert denied*, 369 U. S. 830, 7 L. ed 795, 82 S. Ct. 846, which was inferentially approved in *Sullivan, supra*, at footnote 20, properly left to the jury the defense of qualified privilege relied upon by petitioner. We say that this charge was proper as the law of the trial in view of the requests submitted by respondent when the case was tried in 1963, and petitioner's failure to object or except to instructions given.

Since the answers to the questions at issue depend upon the record below, rather than on abstractions, we brief the trial record in detail here.

STATEMENT OF THE FACTS

Belknap County, since depression days, has owned and operated as a proprietary recreational business, the Belknap County Recreational Area in Gilford, New Hampshire (3 T. 155). The public officials in charge of this facility as a County operation until September 15, 1959, were the three elected County Commissioners (N. H. RSA 1955, *c.* 28, *ss* 4, 5, 6, 7; *c.* 23, *s.* 2). The County Commissioners in turn are subordinate to the County Convention with respect to raising and appropriating money, making major expenditures and borrowing (RSA 24:13, 15). From 1945 forward counties were authorized by statute (RSA 23:2) with regard to recreational areas, to "employ such supervisors, instructors and other officials as may be necessary". No statutory delineation of the powers or duties of such supervisors of recreational areas, nor provision as to salary, title, or tenure has ever been enacted.

In 1950 the then County Commissioners hired Frank P. "Fritzie" Baer as supervisor of the Belknap Recreational Area, to devote his entire time to its affairs—"at least eight hours a day, six days a week" for $6,500 a year plus expenses. The contract was for one year, terminable, however, by the Commissioners, on two weeks notice (Exhibit 17; 1 T. 172). Baer worked under this contract until 1953.

At the 1953 Session the New Hampshire General Court enacted Laws of New Hampshire, 1953, *c.* 344, which, in *s.* 2 required that the "manager" of the Belknap Recreational Area be employed by the Commissioners *with the approval* of the County Convention, and that any contract of employment be signed by the Chairman of the Convention after approval by the Convention. This statute did not delineate the powers, duties, salary or tenure of the office, but merely required the Convention's approval of the hiring and contract. Subsequently on November 27, 1953, Baer's contract was re-executed for a two-year period with a salary increase to $7,150, to continue in effect after January 1, 1955 on a *week-to-week* basis subject

to a two-week termination notice by either party (Exhibit 17; 1 T. 172).

Baer worked under this arrangement as supervisor or manager of the Area, with salary increases that eventually reached $8,000 per year, until July 10, 1959, but on a week-to-week basis from 1955 on.

Under these contracts, Baer agreed that he would "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (*Para.* 5); "transmit all funds accruing from said recreational area to said County Commissioners at such time and in such manner as [they] shall from time to time prescribe, and that he will transmit all invoices, accounts, bills, statements and other like papers to [them]" . . . (*Para.* 6); to "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same in accordance with such procedure as may be adopted by said Commissioners" (*Para.* 7).

Other provisions of *Para.* 5 gave Baer the responsibilities and duties of the "Manager" of the Area, but *Para.* 8 specifically withheld from Baer the powers of manager, *viz*:

> "It is understood by and between the parties hereto that the said commissioners are, by law, responsible for managing said recreational area and that said commissioners do not have the power to delegate said managerial powers to the said Frank P. Baer, and that consequently, the said Frank P. Baer, in the performance of his duties hereunder, shall act subject to the direction and control of said Commissioners, in a supervisory capacity: it is further understood that said commissioners shall retain their power relative to hiring and firing personnel, relative to maintenance, relative to construction work, and relative to finances, and that the said Frank P. Baer in supervising such matters will act subject to the direction and control of said Commissioners."

During the ensuing years under Baer's "management", gross annual revenues increased from $53,000 in 1950 to more than $200,000 in 1958, with $980,354.01 being received during the 1950-1958 period (Exhibit 23; 2 T. 71). These revenues were "plowed back" into further development, and when Baer was terminated, the balance sheet assets of the Area totalled $979,257.93, offset by total liabilities of $40,132.19, for a net worth of $939,125.74 (See Exhibit 42; 5 T. 8).

Baer handled the cash received personally, "all the way to the bank". He was "entirely" in charge of collecting it, accounting for it and turning it in (1 T. 172-173, 198, 209, 210).

On June 15, 1959, Laws of New Hampshire 1959, *c.* 399, was enacted, taking control of the Belknap Recreational Area out of the hands of the County Commissioners and vesting it in a 5-man "Area Commission" as of September 15, 1959.

The 1959 act, in its sections 1 and 10, gave the new commission plenary powers to operate, maintain, develop, improve and promote "the Area, as a body politic and as an agency of the County". Its Section 17 provided that upon the appointment of the Area Commission ". . . the County Commissioners of Belknap County shall be relieved of all duties and responsibilities with respect to the operation and maintenance of the Area". Chapter 344 of the Laws of 1953 was repealed, but there was no other reference to the "manager", nor is the "manager" or "supervisor" provided for specifically in the new act.

Upon enactment of the 1959 Act, the County Commissioners, on June 23, 1959, notified Baer that his contract was terminated as of July 10 (Exhibit 20, 1 T. 191). Their reason, according to the Chairman, was to enable the new Commission to hire its own manager with "no strings on the past" (1 T. 194), but expecting that the new Commission would "re-hire Fritzie when it took over in the fall" (1 T. 193). The termination had nothing to do with the manner in which cash

was handled and the Commissioners never had any question about Baer's honesty (1 T. 194, 211-212, 215; 5 T. 12).

Baer also assumed he would be re-hired in the fall (3 T. 171) and in putting out feelers for a new position indicated that he would be available only if he were not re-hired (4 T. 67). He applied for his old job to the new Commission in the fall, but the job was given to an experienced ski area manager, Warren Warner (3 T. 173-175). Baer then began in earnest to seek new work, and was given assurances he could be active again in the motorcycle field, at no less pay than he had received at Belknap (4 T. 18, 21, 81).

Thus Baer was unemployed, looking for re-employment, with his reputation an asset in that quest, on January 29, 1960.

Petitioner Rosenblatt in 1960 was a successful merchant operating Lee's Cut Rate in Laconia and Sterling's Cut Rate in Concord, who owned two pieces of commercial property and his own home (2 T. 56, 63). College educated, he had studied English and journalism, banking and finance and psychology. He had been a radio script writer and news release writer in earlier days in public employ (2 T. 57-61). In his merchant's capacity he was familiar with the daily collection, reconciling, accounting for and depositing of large amounts of cash income, his Laconia store grossing $400,000 annually, his Concord store grossing $250,000 (2 T. 89).

From 1958 on, Rosenblatt gratuitously submitted a daily column to the local newspaper, which was published under the caption "Out of My Head" (2 T. 40, 57-66). He was not writing for pay as a working journalist—he volunteered it without financial recompense. He was not assigned any topic, but wrote whatever he pleased. He had no obligation to submit any particular article at any time, and no deadline to meet (2 T. 74-76).

Rosenblatt knew Baer and also knew that he was the manager of the Belknap Recreational Area (2 T. 81). His col-

umn "Out of My Head" contained the following excerpted comments concerning Baer during the two years preceding the libel complained of (italics added):

December 11, 1958 (Exhibit 24; 2 T. 136):

> "That Belknap County Recreational Area big headache no secret. Nobody satisfied with it. *Not Fritzie Baer, the Manager,* not the County Commissioners who run it, not skiers who use it, not County legislative delegation. • • •
>
> "• • • As is now *Area has never made a dime profit. If properly run could pay all of the County's taxes* and have good chunk left over to spend on schools. Present commissioners have to face facts. Either they do something and do it quick or pretty soon, one of these years, Area not just going to break even but show fifty or a hundred thousand dollar loss. . . ."

In the 1958 calendar year when this piece was written, the Area made a net profit of $53,791.99 on some $206,000.00 of receipts as audited by the State Tax Commission, having made a net profit of $8,886.83 in the prior year, as audited (Exhibit 19, at Exhibit I thereof; 1 T. 188).

December 16, 1958 (Exhibit 25; 2 T. 141):

> "The waiter said, as he looked scornfully at the 12 cent tip for a $1.20 lunch: *'It's correct but it ain't right.' So say most of us when we hear Fritzie Baer speak of the Belknap Recreation Area as 'the million dollar area.'* Probably worth well more than million bucks but what good does it do to people of Belknap County who own it?
>
> "Truth is not worth more than plugged nickel to us unless we happen to be skiers which most of us are not. *Pays no taxes and earns no revenue.* • • •

"This please is NOT criticism of Fritzie as manager. Think that man one of the greatest 'promoters' ever knew but poor guy's hands hogtied by a complete lack of capital for making real improvements. . . .'*

December 20, 1958 (Exhibit 27):

"Thursday's Evening Citizen carried in Letter Box a letter from a real mad man who signed himself as 'Chairman, Belknap Ski Advisory Board'. In first part of letter fellow says reason he's mad is because I big liar. . . . * * *

"*I called Fritzie Baer, manager of the Area,* and asked him what the Belknap Ski Advisory Board was and who appointed it. *Fritzie told me he appointed them himself.* Might also add here that mad fellow happens also to be paid employee of Belknap Area. Gives ski lessons. Gets paid for it."

January 9, 1959 (Exhibit 28; 2 T. 146):

"*Listened to Fritzie Baer the other day at Chamber of Commerce* and he reminded me of Styles Bridges.

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*One man's dissent from the allegations of this column is illustrated by Exhibit 26, 2 T. 142, 5 T. 93, signed by Arthur Rothafel, Chairman, Belknap Ski Advisory Board, in which Rothafel wrote of Rosenblatt's article:

"How can a publisher whose unquestioned integrity has been a fine influence in this Community permit the unrestricted use of his newspaper's columns to Mr. Rosenblatt? Half-truths, distortions, and downright falsehoods have no place in a reputable newspaper.***

"Contrary to implication in the column yesterday, Belknap Area does pay taxes to Gilford.***

"***A bill calling for the creation of [an Area Authority with power to arrange and implement a long-range program for progressive expansion of Belknap facilities and use] is already being prepared for presentation to the legislature.***

"***Mr. Rosenblatt's concern is belated. The distortions of fact so obvious in yesterday's column do much more harm than good."

When Bridges makes public address he uses up every second of time so there's never any question period. Fritzie did same thing.

"Had whole bunch of questions ready to ask but never got chance. So—going to ask them right now. *Not necessarily of Fritzie,* although of course he welcome to answer them *but of him* AND County Commissioners."

[Some forty detailed fiscal control questions follow seeking answers as to how cash is collected, controlled, accounted for, and spent, including the following:

"3. How is money handled at area? For tickets? For meals? For anything? *Who* counts it? *Who* deposits it? Are register tapes kept, etc., etc. Please explain system.

"5. What is payroll of Area? *To whom paid?* How much?

"6. How are retail operations handled? *Who* is buyer? * * * (concerning inventory:) *By whom* counted? Under what supervision? (From whom are goods, services purchased?) * * * *Who decides?*"

"Who gets free passes to use Area facilities? Now? In past?]

"Is important to remember that asking of these questions should in no way be construed as inference on my part that anything *necessarily* wrong. However, we are often told that Area is 'your Area—YOUR million dollar Area'. OK. If 'my' Area then feel it reasonable to ask above questions as would any reasonable person be interested in business which belongs to him."

The evidence on this trial was that the County Commissioners advised Rosenblatt when these questions were published that he could get all his answers by looking over the detailed records at the County Courthouse, and they *gave* him Annual County reports, but that he never came in for the additional

detailed information. They also instructed Fritzie Baer *not* to answer Rosenblatt (5 T. 1-7).

The answers to these detailed questions were submitted, however, in a letter to the editor by Robert Baer, the "assistant manager" (see Exhibit 30; 2 T. 156), published on January 12, 1959. They indicate that the fiscal control is exercised by the Area Manager:

> "3. Don't believe it necessary to go into detail on how money handled other than to say that all tickets sold as in other public areas, etc., on a number basis and records kept on all tickets printed, sold, etc. Register tapes are kept and all departments audited by the State Auditors. *Money is deposited by manager daily,* so as not to leave surplus of cash in building overnight. Not only are records audited by State, but by a CPA hired by County delegation, and paid for by Area. Also a bookkeeper paid by Area at County Court House. All things pertaining to records were investigated by the special delegation committee this summer looking into Area management, and perhaps Mr. R. will recall their 'clean bill of health' re Area management. If not, will be glad to furnish him with copy of Citizen in which this appeared.
>
> 4. *Hiring at Area is done by Manager* as should be the case • • •
>
> "7. • • • *The question of who decides must be answered with management. Who else? That's what he's there for.* To manage.
>
> "8. The question of *free passes* almost sounds personal. But again, as in Mr. R.'s business, it *is up to management.* • • •
>
> "9. There are no concessions at the Area. *All departments are under direct supervision of Area manager.* • • •
>
> "I have undertaken to answer these questions of Mr. Rosenblatt, not because I feel the Area is obligated to do so, but because personally, I feel they have stirred

up doubts in the minds of many, and all the people in the County have a right to know the true picture."

January 13, 1959 (Exhibit 29; 2 T. 152):

"Two interesting letters in Monday's Evening Citizen. One by Brenda Baer, one by Robert Baer. *Cannot, of course, consider them answers to questions asked of Fritzie Baer and County Commissioners.* Only fair to let them answer for themselves."

January 21, 1959 (Exhibit 31; 2 T. 161):

"Talking about Area questions *have not yet heard from Fritzie Baer, Bill Stafford or Joe Smith. Have series of County reports but not much information in them. Please, gentlemen, let us have answers very soon.*"

January 27, 1959 (Exhibit 32: 2 T. 164):

"Remember questions asked about Area on January 9 in this space. *Fritzie Baer in public speech on Jan. 22 said he was not going to answer them.*

[Thereafter restates questions, in shorter form.]

"Now doggone it what's wrong with those questions? • • • *Why should anyone be unwilling to answer those questions? Would the answers be embarrassing?*

"*If so, to whom?* • • •

"Yet *Fritzie Baer says he will not answer.*

"WHY?

"Can tell you one thing gentle readers. *Maybe Fritzie won't answer the questions. However if he doesn't am sure someone else will.* One thing for sure: Gonna keep on asking them till somebody does."

After having in this manner demanded in public print four separate times that these questions be answered, and having thus complained three times that he could not get the answers, Rosenblatt never acknowledged in his column that he *had*

been supplied the answers, was satisfied, and that there *was in fact nothing wrong* with fiscal control.*

February 14, 1959 (Exhibit 33; 2 T. 170)

> "Read in Evening Citizen about the new bill to create a Belknap Recreation Area Commission. Was first time ever even heard bill being readied. * * *
>
> "Regardless of secrecy . . . bill is as phony as three dollar bill and is virtually useless insofar as making *Area* into something worthwhile instead of *an antique relic run for benefit of one family* and favored friends."

The evidence in this case indicated that Fritzie Baer's wife, son Robert, daughter-in-law Brenda, and a younger son James, worked at the Area at various times, getting the same pay that was given others doing similar work. (See 3 T. 176, 178, 186, 187). No claim was made at the trial that any of the Baers were improperly overpaid.

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*Yet the 1959 Annual Report of Belknap County (Exhibit 9; 1 T. 85) records that Rosenblatt appeared at the March 2 Budget hearing, asked questions, and was told that "the answers to other questions as to expenses could be found if anyone chose to consult the records in the Commissioners' office" (*p.* 6), and that on April 30, at a hearing on H.B. 319, Rosenblatt spoke, and (*p.* 10):

> "He stated that since the Budget Hearing on March 2, he had been able to find the answers to questions on Area management by reading the records in the County office. He gave excerpts from Area records back to 1945."

And this episode was reported in the Citizen at length (Exhibit 36; 2 T. 184):

> *"Rosenblatt's Research*
>
> "Alfred Rosenblatt had done a great deal of study of the area through county reports dating back to 1945. The area cost $885,000 in 1936 of which the county paid $244,000, he said. At the present rate he said the cost could be $2,500,000. The area he said did not start to make money until public opinion forced the commissioners to hire a business manager. He held the commissioners 'rank failures as recreational operators.' He had a report based on long research but due to the lateness of the hour condensed it."

When Baer was terminated by the County Commissioners on June 23, 1959, the event was made the subject of the Evening Citizen's front page lead story and a front page editorial (Exhibits X, Y; 4 T. 63), and it also made page one of the state-wide newspaper (Exhibit 45; 4 T. 76). Rosenblatt's column came out two days later:

June 25, 1959 (Exhibit 34; 2 T. 171):

"Received whole bunch phone calls last couple of days. Phone call, visits, and on-street stoppings. • • •

"General composite tenor of all calls, visits, was something like this: 'Hey Bigmouth. *Howcum you had nothing to say about firing of Fritzie Baer by Commisshes?*'

"Well only reason could give and can give is *don't know whole story yet.* • • •

"Commisshes responsible for hiring and firing of county personnel. That their legal duty and obligation. *Cannot offhand simply assume they did it without reason. Maybe they had darned good reasons.* Not fair to jump to conclusions without having asked them.

"*After all Fritzie did have substantial portion his own family on county payroll.* Maybe this good—maybe not. *Certainly on face of it, nepotism hardly best public policy.*

"Waters at present too muddy to see bottom. Have to wait couple days."

Rosenblatt never did write whether his assumption that Baer was "fired" for cause was correct. At this trial, no one suggested that the termination was for any reasons involving his honesty or integrity (See 1 T. 194, 5 T. 9-12).

From July 10 on, Baer was a candidate for rehire at the same job. On August 28, Rosenblatt volunteered his view as to whether Baer should be rehired or replaced (Exhibit 35; 2 T. 176).

"New Belknap Area Recreation Commission now confronted with problem of hiring new manager *to replace*

Fritzie Baer. Don't mean presume on their province . . . • • •

"Would like to respectfully suggest, however, that they engage fresh, new, man without any local ties whatsoever.

"If pick any local person will be automatically handicapped by emotional bitternesses lingering from past. New man from out of town, with no local associates will come unsullied and with open mind. Will be able to make dispassionate appraisal of personnel without being prejudiced by personal associations and politics.

"Will avoid criticism of commissioners themselves, for if hire local person will be charged—rightly or wrongly—with playing politics, paying off personal obligations, etc.

"Brand new person seems to me would be best bet."

On September 3, Rosenblatt returned to the same theme, and, although Baer's salary was never higher than $8,000 plus expenses (3 T. 158), and although Baer had a national reputation, wrote (Exhibit M; 2 T. 192):

"If the new Belknap Area Commission decides to engage a manager and pay him *$10,000 per year which is what Fritzie Baer was getting*, then it seems very logical that *can get real top notch person of national reputation and calibre*. With that kind of money do not think Commission can merely sit back and wait for applications from local people."

On Tuesday, January 26, 1960, the new Area Commission Chairman, Dana Beane, introduced the new Manager, Warren Warner, to the Chamber of Commerce at a meeting held at the Area (5 T. 22). Rosenblatt heard the talk. Beane gave no specific financial information in this talk, and no comparative financial data comparing to prior operations (5 T. 24, 34). Warner gave no financial information at all, then or thereafter (3 T. 28-29).

Rosenblatt testified that he thereafter talked to three Area Commissioners by telephone, Beane, Dr. Lacillaide, and Dr. Baker (2 T. 119). Neither Beane nor Dr. Lacillaide recalled that they gave Rosenblatt any specific financial data (5 T. 44; 4 T. 153); Dr. Baker was out of the State and did not testify, but Rosenblatt acknowledged that he didn't recall Baker giving him financial data. There in fact was no comparative financial data in the Commission's possession at the time that covered any period of time (5 T. 42-43).

On Friday, Rosenblatt's column, "Out of My Head", carried the following item (Exhibit 10) (Italics added.):

> "Been doing a little listening and checking at Belknap Recreation Area and am *thunderstruck* by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in *procedure;* the difference in cash income *simply fantastic, almost unbelievable.*
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, *months earlier* last year, one can only ponder following question:
>
> "What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results?"

The public reaction was immediate, and readers understood the article to insinuate that Baer, who was the person who handled "all the money last year", and for the nine preceding years, had stolen Area funds:

> "Well, I work at Hounsell's Drug, and everybody that was coming in for cigarettes and papers and so forth was discussing it, so, of course, once I got home I really

wanted to read the article. I understood it was pretty hot. (3 T. 128) • • • Well, it went like wildfire for all of a week. . . ." (3 T. 132)

"When the article first came out, the general trend was, did Fritzie or did Fritzie not take money from the Area, and it seemed to be the consensus of opinion— a lot of guys thought that because he had been fired that maybe that was the reason why he was fired." (3 T. 137)

"I just heard about the column while I was on Main Street. I was quite shocked when I heard about it. • • • [When I got home I] went and read the article and I was even more shocked. • • • It shocked me because one of my good friends had been implied in this article, as I read it, that money must have been taken by him at the Belknap Area." (3 T. 142)

A police sergeant:

"It gave me the impression that Mr. Baer was stealing money from the Area. • • •

"There was discussion. I heard discussion of this article at the police station amongst the officers. • • • [I]t cast some doubt in some of their minds, and the remark was made that if an article was printed to that effect he must have some proof of it or he wouldn't put it in the paper. • • • There must be something to it, yes." (3 T. 124)

A businessman and City Councilor:

"Sticky fingers." • • •

"The article pointed, to me, that Fritzie Baer had been taking funds from the Area." (3 T. 133, 137)

A realtor:

"The next morning when I went into town it was discussed practically everywhere that I would stop (3 T. 143) • • • [T]hey were talking to me that they were

wondering how much money had been taken . . . (3 T. 145) 'The impression' was whether it was Fritzie that had taken the money or probably someone else in his family." (3 T. 149)

A businessman:

"Well, I took it that it meant that Fritzie had been stealing money at the Area. That's the way it came through to me." (4 T. 93)

The Manager of a clothing store:

"Well [my understanding was] that Fritzie helped himself to the funds the previous year." (4 T. 126)

Comments of others recalled by a school janitor:

"Well, what's the guy got, sticky fingers?"

"'Well, no wonder he's driving a Cadillac'" (4 T. 134)

After hearing such discussion the effect on the witness was:

"'Well, I was starting . . . to get the idea that maybe he *was* pulling something out of the till up there.'" (4 T. 136)

The Executive Secretary of the Lakes Region heard the insinuation discussed throughout the ski area (5 T. 15) where Baer was very well known (5 T. 16), and at ski industry meetings as far away as Concord (5 T. 17). A ski school instructor heard it discussed at the Mt. Mansfield Ski Area in Vermont (3 T. 85).

Why did readers consider that the insinuation was directed at Fritzie Baer?

"Fritzie had become almost the personification of that Area. He, in the minds of the public, and, for that matter, in my mind, was the operator of the Area, period." (3 T. 79)

The Laconia Post Master related it to:

> ". . . [T]he man that's directly in charge of the Recreation Area, which at that time happened to be Fritzie Baer." (3 T. 113)

The police sergeant:

> "Because of the fact that Mr. Baer was the Manager, and I know that he had practically full control of the money that came in because of the fact that my wife worked there just prior to this article as well." (3 T. 124)

The extent and nature of the discussion of the article in the Town of Gilford was reflected in the public school where Fritzie's granddaughter, Ellen, was a fourth grade student. The teacher recalled:

> "Ellen was a very intelligent child and a very excellent student, and I suddenly noticed that she seemed most unhappy, very nervous, very inattentive. I must say that I had reason to believe that I knew the reason, but, of course, I never make any comment to a child in that way; but at one recess time, Ellen came screaming into the classroom with several children behind her and, of course, in the vernacular of the school child said, 'Mrs. Barnard, the kids are teasing me terribly. They're saying awful things.' So as every classroom teacher has to handle a situation, I calmed the class—of course, there were those children who were for and those who were against, and I, of course, said to her, 'Why, my dear, what are they saying?'. And this is exactly what she said: 'They are calling my grandpa and my daddy a thief. It said so in the paper'. I quieted the class, and I gave them what you would term a talking to. I simply explained to the children that regardless of what we read in the paper that we do not tease other people about it. If it concerned their family, we certainly said nothing about it, and that I wished never to hear any of my class bother her again.

> As far as I know, the children in my class did not. However, I do know that Ellen was taunted again on the playground because she began to wish to stay in and not go out. " • • Ellen was never the same child in my classroom. She was what you might call a blithe spirit until that winter. From then on, she was a very different child." (5 T. 63-64)

Plaintiff Baer was called and asked if *he* had read the article, before his paper arrived. When he read it, and he read it several times, he understood it to imply (3 T. 179):

> "It was absolutely no question in my mind, I being the man who had charge of the money, charged by the Commissioners, counted the money, took it home and counted it, had complete charge of it, that I had been stealing thousands of dollars, literally thousands of dollars."

He went to Dana Beane, Chairman of the Area Commission, to find out why the story had been released. Beane told him he "had *never given any*" financial information out which would justify the story (3 T. 188), that he "had given out no figures, nor any member of his Board" (4 T. 14). He also went to the County Commissioners and they assured him that they had given out no figures from the prior year for comparison (4 T. 14-15). He did no further investigation, but waited for a further article of explanation (4 T. 73). He asked for no apology or retraction, feeling that "the damage was already done" (4 T. 72, 74). He sought counsel:

> "Because of the constant reaction I got from people downtown and what happened in Gilford, I just had to decide I'd have to do something" (4 T. 75).
>
> "It got to be uncomfortable."
>
> "People would stop talking when I came to them. If I'd come into a crowd, the conversation would automatically stop."

"It made me very sick • • • [D]iscouraged and downhearted." (4 T. 16).

After a couple of weeks of this, "Fritzie disappeared, sort of" (3 T. 86)—he spent his time at the Weirs working on a house he had purchased, "to occupy my mind" (4 T. 17, see 3 T. 147). He was mentally depressed for two months or so, and in no condition to be seeking a job (4 T. 169).

Whereas before the publication, there were apparently many people who would have hired Baer in the same general line of work for at least as much money (4 T. 18, 21), after the article there was a definite change in the attitude (4 T. 19). As Mrs. Baer expressed it "[T]here was just a coolness that set in, and I can't describe it" (4 T. 172).

The effect of the article still continued to the date of trial (4 T. 172, 3 T. 24); discussion of it comes up when Baer's name is mentioned; it really "never ended" (3 T. 125, 134).

Baer never received any offers of new jobs (4 T. 19). He made himself available for the position of Executive Secretary of the Laconia Chamber of Commerce, but his name was not submitted for reasons explained to him (4 T. 24, 26). Precisely what happened is unclear on the record (compare 4 T. 125, 5 T. 104-108 and 118 with 5 T. 110, 121, 3 T. 84, 91-92), but Baer did not get the job. He eventually went into real estate selling, a job for which he had no prior training (4 T. 19, 70).

His earnings from 1954 through 1962 are compiled in Exhibit 44. (4 T. 23). While he earned between $7,100 and $8,000 during 1954-1958, his 1960 earnings were not over $300, and in 1961 he earned about $6,400, in 1962, about $6,000 (Exhibit 44, see 4 T. 21-24). Thus reduction of earnings of $1,500 to $2,000 after the article (plus 1960's complete loss) were in evidence. Baer was 61 at the time of trial and his life expectancy was 15.44 years (5 T. 135).

Petitioner Rosenblatt's deposition was taken before trial, and he was called in plaintiff's case and testified at length. His

credibility was placed in issue and he repeatedly and patently lied in an effort to avoid liability (See 2 T. 81-175 generally; 2 T. 174-175 particularly). He was specific as to his use of language in the article, however:

1. The period of time he intended to compare during which he wrote that "difference in cash income simply fantastic, almost unbelievable" was "in the comparative period *from the time the new Commission took over* [*September 15, 1959*], *as against a similar period of time prior to the time they took over* (2 T. 93-96, 187).

2. The phrase "cash income" was intended to refer, specifically, to the *gross receipts* at the Area (2 T. 89-92).

3. In writing "on any kind of a comparative basis, the Area this year is doing literally hundreds of per cent better than last year", Rosenblatt used the word *literally* to emphasize to his readers that this was, *as a matter of fact* true, and not an exaggeration; he used "hundreds of per cent" to indicate an improvement of more than 100%: "more than twice" (2 T. 106).

Since he wrote the article on either January 28 or 29, he had no knowledge of, made no reference to, and obviously was not referring to cash receipts that were generated *after* January 28 in January (2 T. 115).

As a matter of fact, there was no significant change in the "cash income" being experienced at the area. The evidence was that gross receipts during both periods, with the exception of petty cash requirements, were deposited (4 T. 6; 3 T. 33-35). Factually, Baer deposited $65,471.17 during the period Sept.-January inclusive; in the following year the deposits were *less*, $53,396.93 (1 T. 54, 57). Making adjustments to convert these figures to Sept. 15-January 30 periods, and eliminating non-operating revenue, (2 T. 102-103), it appeared that this

period in Warner's year grossed $53,396.00 against Baer's $52,-756.00 (2 T. 105).*

Thus it appeared that *in fact* there was no disparity of "cash income" at all that justified writing about it.

If only that portion of the period during which there were snow be compared (Rosenblatt suggested this as the period, too, 2 T. 93), the results, *up to the time of Rosenblatt's article on January 29* showed (5 T. 49):

Baer's December-January	$49,775.49
Warner's December to January 29	$49,932.59

Consequently, here again there was no disparity that would occasion a publication. See Restatement of Torts, §598. Neither was there any betterment in the "net cash results" as it turned out. In spite of all the 1960 improvements which included more restaurant space, ticket price increases, etc., percentage-

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*While various adjustments to the financial data may be suggested, and were below, to achieve direct comparison, precise accuracy or complete equality is not the issue toward which this evidence was introduced. The libel charged that "*difference*" in cash income between the two years was "*simply fantastic, almost unbelievable.*" The extent of "difference" charged is made specific, factually, as "literally hundreds of per cent BETTER than last year." Rosenblatt acknowledged that he used "literally" accurately, to indicate that this was 'as a matter of fact true', "a fact literally true." (2 T. 106) No adjustments could be suggested that would warrant this conclusion of fact.

Defense counsel below inferentially acknowledged that this was a desperate situation for the defense. They attempted to ignore the September-January period actually being compared, and emphasized that January to January figures ($21,000 to $51,000) showed 1960 "over two hundred per cent" better than 1959 (1 T. 159); ignoring the fact that Rosenblatt could not have been comparing records not yet made (2 T. 115; 5 T. 73), and that snow conditions explained the existing difference. They recklessly compared a specific single 1960 weekend in which Warner's regime has $11,800 of receipts against Baer's $1,700 the prior year (5 T. 70, 71), apparently without realizing that ski conditions on the 1960 weekend were optimum (5 T. 79, 80) and on the same weekend the previous year, there was little or no skiing because conditions were "Bad" (5 T. 81, 82). The witness who gave them these figures acknowledged that it was not a valid comparison.

wise Baer's last year was as good as Warner's first year (4 T. 162). Consequently, as a matter of fact, there was no occasion to suggest either that "cash income" had disappeared or that "net cash results" were questionable. This indicates an ulterior purpose in the writing—not a public interest piece on a lawful occasion.

The petitioner himself admitted (2 T. 88):

> "Had I not been told that there was a great difference between that January and the other January, I would probably not have had occasion to write the article."

On the evidence, he was *not* told that there was any such difference, and the difference did not in fact exist.

Rosenblatt claimed that his sources of information were Warner and three members of the Area Commission; that the fiscal information he relied on was entirely acquired by telephone calls to Dr. Baker, Dr. Laccillaide and Dana Beane, Jr. He acknowledged that he was shown no fiscal data, did no checking of public records as to prior years, and had no notes or other memoranda to support his claim (2 T. 118-123). The jury was free to disbelieve Rosenblatt's claim in the face of the undisputed evidence that such facts did not exist and the failure of his supposed "sources" to support his claim. Warner was specific that he gave Rosenblatt no financial information (3 T. 28, 29). Dr. Lacillaide was specific that he gave no such information (4 T. 153, 154). Dr. Baker was not presented as a witness, being out of the State. Beane, a C.P.A., and testifying circumspectly (his personal counsel was trial counsel for Rosenblatt (5 T. 41)) nevertheless said *he* gave Rosenblatt no internal figures, *had* no formal statements at that time to present to anyone, for either December or January; that anything he *may* have told Rosenblatt would have been fragmentary (5 T. 42-44) and general (5 T. 77).

Beane knew the Area was not doing "literally hundreds of per cent better than last year" (5 T. 21, 26, 34). While the Commission had financial information which would permit

daily receipt comparison to days in the prior year, they were *not* comparing accumulative receipts, and had no such figures (5 T. 32-34). Beane was specific that he did not give Rosenblatt any information with respect to the period claimed to have been compared—September 15 to January in each year—(5 T. 34). Beane did not have December 1959-January 1960 figures available until after a February 1, 1960 meeting, and hence could not have given Rosenblatt comparative data for the snow seasons or for the Januarys separately (See 5 T. 41-50). When the figures were finally produced in February, they showed no increase that would justify the article Rosenblatt wrote (5 T. 51-57).

On the entire record digested above, the jury was at liberty to conclude that Rosenblatt was given no information from any of his claimed "sources" that prompted or justified his publication; that there was no factual basis for the writing; and that Rosenblatt deliberately prevaricated his "facts" with a reckless disregard for whether they were true or false for the malicious purpose of provocative defamatory insinuation that Baer was dishonest. Since the evidence warrants such a finding, the record, viewed on appeal after a general jury finding for plaintiff, is to be considered on the basis that such is the fact.

The jury findings and limited appeal.

The special declaration of this common law writ alleged that the defamatory innuendo of the publication declared upon was that respondent *"had committed larceny, that he had stolen or embezzled or converted to his own use large amounts of money belonging to the Belknap Recreational Area. . . ."* See R. C., *p.* 3, lines 19-25, 26-32, 37-42, 43 to *p.* 4, line 5, 7-12. As the case was tried, no one claimed Baer was a public official, and Rosenblatt denied he wrote of Baer at all. The case was submitted for jury determination of the factual issues under a charge that began with this instruction (5 T. 147, 148, italics added):

"The first issue in the case is whether or not the language in the article, or any part of it, was *used* in a defamatory sense *and* was so *understood* by the readers. As I said, Mr. Baer (148) has the burden of proof on this issue. . . ., and *he must make it appear a little more probable than otherwise that the language was used by the defendant in a defamatory sense and that it was so understood by the readers* of the column; and unless the plaintiff so satisfies you that it is a little more probable than otherwise that all, or some part, of the language in the article was *used* in a defamatory sense *and so understood* by the readers, then you should return a verdict for the defendant, and that's the end of the case.

"You should understand that it must be used and understood in a sense which is derogatory and defamatory of the plaintiff himself, Mr. Baer."

The jury's general verdict for the respondent (plaintiff below) therefore imports a finding of fact that petitioner *used* the language in the article declared upon to insinuate that respondent Baer personally had stolen, embezzled or converted to his own use money of the Belknap County Recreational Area.

Petitioner has admitted below that the factual issues on this phase of the case were properly left for jury determination, and the Supreme Court of New Hampshire agreed. Article 7 of the Amendments to the Constitution of the United States requires that those facts not be re-examined by any court of the United States.

The facts related in the article declared upon were proven to have been wholly false, and the insinuation was not only proven false; it was admitted to be false below (1 T. 29).

Thus a *false* insinuation of Baer's being a thief or embezzler is to be assumed to be involved.

The case was tried prior to the *Sullivan* decision, under the law of *Chagnon* v. *Union Leader Corp., supra,* 103 N. H. 426, of which certiorari was denied by this court, 369 U. S. 830.

Under the *Chagnon* rule the jury was instructed, *without objection or exception,* that they might return a plaintiff's verdict in the absence of malice, but that if they found malice they might award more liberal damages (5 T. 160). No appeal was taken from this aspect of the charge, and none lay inasmuch as no exception was saved in the trial court (5 T. 165 *et seq*). Not only is the point waived, however, the petitioner in the Supreme Court of New Hampshire acknowledged, and that Court presumed, that the jury verdict was premised upon a *finding* of malice, because it is discernible from the amount of the verdict that exemplary damages are included. Consequently, that aspect of the charge appears to be moot here, and petitioner does not argue it.

The trial court's definition of malice was similarly not excepted to, nor was the instruction that "reasonable belief" in the truth of what he wrote was required to sustain a defense of privilege. Consequently, we believe that neither of these two matters are properly before this Court, they having been waived by petitioner in Superior Court in 1963.

ARGUMENT

I.

Respondent Baer, at the time of his employment as supervisor of the Belknap County Recreational Area, was not a "public official" under the decisions in New York Times Co. v. Sullivan, 376 U.S. 254 and Garrison v. Louisiana, 379 U.S. 64.

We rely upon the settled law as set forth with ample citation of authority in *State ex rel Barney* v. *Hawkins*, 79 Mont. 506, 257 Pac. 411, 53 ALR 583 (annotated on the point at 595) that respondent Baer was a public employee, not a public official, when employed as supervisor. Both the law of New Hampshire (*Opinion of the Justices*, 73 N. H. 621, 62 A 969; *Wiggin* v. *Manchester*, 72 N. H. 576, 58 A. 522; *Ricker's Petition*, 66 N. H. 207, 29 A. 559) and Federal law (*Martin* v. *United States*, 93 CCA 484, 168 Fed. 198; *United States* v. *Maurice*, 2 Brock 96; *Adams v. Murphy*, 91 CCA 272, 165 Fed. 304) recognize this settled law. See also annotations, 93 ALR 333, 140 ALR 1077.

> "Practically all of the authorities . . . hold that to an officer are granted some of the sovereign powers of the government, to be exercised for the benefit of the public. They hold, also, quite generally that an officer's duties must be prescribed by law, and that he must be independent in the exercise of them, and not subject to orders from a superior as to the nature or discharge of his duties, . . . * * * Those two rules, stated above, delegation of sovereign power and independent exercise of it, . . ., appear to be general."
>
> *State ex rel Barney* v. *Hawkins, supra*, 53 ALR at 589.

> "The duties of an officer are fixed by law, and an employment arising out of a contract, whereby the person employed acts under the direction and control of others, and which employment depends for its duration and extent upon the terms of such contract, is not an office. . . . While an officer may be appointed by constituted authority, yet in the discharge of his duties, he knows no

guide but the established law, and cannot be lawfully directed by others in the conduct of his office." *Farley* v. *Board of Education*, 62 Okla. 181, 162 Pac. 797.

Analyzed under this settled law, Baer's contract was one of public employment, but he was not a public official.

The 1945 enabling act (RSA 23:2) which authorized counties to employ "such supervisors, instructors and other officials as necessary" prescribed no duties and conferred no powers on persons who might be hired: it merely authorized such persons to be employed. The 1953 act (Laws 1953, *c.* 344) similarly granted no powers to the manager and conferred no sovereign powers upon him, but merely required the County Commissioners to obtain prior approval from the County Delegation with regard to such a hiring. The statute specifically recognized that the position was one to be established by an employment contract to be negotiated, as distinguished from an office the outer perimeter of the line of duty of which is drawn by statute and redelegation of specific powers, as was involved in *Barr* v. *Matteo*, 360 U.S. 564, 574-5, 3 L. ed. 2d 1434, 1441, 79 S. Ct. 1335.

If the issue were considered to be close, *the contract itself* (Exhibit 17; 1 T. 171, 172) *is specific, factually,* in its Paragraph 8, *that no managerial powers were delegated to Baer,* and that Baer "in the performance of his duties hereunder, shall act subject to the direction and control of said Commissioners, in a supervisory capacity."

In point of fact, Baer undertook the job on that basis, as the following examination of Commissioner Smith makes abundantly clear:

> *Mr. Bownes*: "And there isn't any doubt that as far as the Commissioners and Mr. Baer were concerned, the control of the Area was by law vested in you [*i.e.*, the County Commissioners]?"
>
> Mr. Smith: "That's right."

"Q. And you had management of the Area by law?
"A. That's right.
"Q. And that Mr. Baer understood when he took over?
"A. Yes, sir."

Examples of the degree of control exercised by the Commissioners are referred to in the record. When Rosenblatt insinuated that the public needed information concerning fiscal controls at the Area which he wanted Baer to supply by answering his published questions (Exhibit 28; 2 T. 146, the questions "should in no way be construed as inference on my part that anything necessarily wrong". . . .), the Commissioners *instructed* Baer not to answer Rosenblatt (5 T. 1-7; 4 T. 50-51), and Baer obeyed (Exhibit 32; 2 T. 164). See also 1 T. 66, 72, 76, 172, 204-207; 4 T. 36, 38, 40, 41, 43; 5 T. 9. During the summer of 1959, the Commissioners operated the Area with *no* manager, after terminating Baer (1 T. 220).

Chief Justice Doe of the Supreme Court of New Hampshire stated our concept aptly in *Ricker's Petition, supra,* 66 N. H. 207, at 231, by quotations from MECHEM, PUBLIC OFFICERS, *s.* 5:

> "'A public office . . . is never conferred by contract. . . . Where, therefore, the authority in question was conferred by contract, it must be regarded as an employment, and not as a public office.'"

Wiggin v. *Manchester, supra,* 72 N. H. 576, involved employment by the City of Manchester of a janitor by contract, and a transfer to a Police Commission of the authority to hire. Both janitors were held employees; they did not achieve public official status merely because the authority to employ them was based upon statutes.

Other local statutes specifically create *county offices* in New Hampshire, the incumbents of which are public officers, *e.g.*, county clerks of court (RSA 499), county auditors (RSA 25),

county treasurers (RSA 29), county attorneys (RSA 7:33), sheriffs (RSA 104), registers of deeds (RSA 478), registers of probate (RSA 548). *In every instance,* the duties of the county public office are specifically outlined in the statute creating the office. All are required to give bond before performing any official act (RSA 27:1).

Public officials are sworn to the faithful performance of "the duties of their offices" (RSA 21:25) and may not act in "*any public office under any law*" in New Hampshire unless and until so sworn (RSA 92:2).

Since Baer was not sworn, and was not required to be bonded, he was not a public officer under the laws of New Hampshire.

Nor is it unusual nor inappropriate that such positions not be public offices. *Mosby* v. *Board of Commissioners of Vanderburgh County,* 134 Ind. App. 175, 186 NE 2d 18 (1962) is directly in point, for there a park manager hired by the county park board under a statute similar to RSA 23:2 was held to be an employee and not a public officer. In *State ex rel Landis* v. *Board of Commissioners of Butler County,* 95 Ohio St. 157, 115 NE 919 (1917) the clerk to the Board of County Commissioners was held not to be a public official; the manager of a county water district was held an employee in *Graves* v. *City of Ponder,* 303 SW 2d 485 (Tex. Civ. App. 1957); in *Barry* v. *Glenn County,* 42 Cal. App. 2d 76, 108 P 2d 81 (1940), a county purchasing agent hired on a month to month basis and completely subject to the direction of the commissioners was held an employee; and in *State ex rel Wickens* v. *Clark,* 208 Ind. 402, 196 NE 234 (1935), it was held that the superintendent of the county asylum and farm was an employee.

We rely upon the facts and the law as above briefed to demonstrate that respondent Baer was not a public official at the time of his employment, by contract, as supervisor of the Belknap County Recreational Area.

II.

The rationale of New York Times Co. v. Sullivan, 376 U.S. 254 and Garrison v. Louisiana, 379 U.S. 64 should not be extended to apply to public employees, nor to apply to this case.

We recognize that this Court, in footnote 23 to *Sullivan, supra,* declined to attempt to delineate "how far down into the lower ranks of government employees the 'public official' designation would extend" for the purposes of the *Sullivan* rule. We would respectfully suggest that the objective tests of statutory delegation of sovereign powers, which are to be independently exercised, under oath of fidelity to the public body for whom the officer acts, which are discussed above, should set the outer limits of the doctrine. If the Court extends the rule *beyond* this point, the option is to extend it to all persons in public employ, or to create a hodge podge in which the duties of employees, undefined by any public record, becomes the test.

The Second Circuit observed, in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659 (2 Cir. 1964) at 671:

> "We realize that the sole point actually determined by that decision [*Sullivan*] was that the First Amendment requires a state to recognize a 'privilege for criticism of official conduct' [citation] extending to misstatements of fact, this being regarded as in some way the reciprocal of the privilege of federal officials for defamatory statements 'within the outer perimeter' of their duties [citing *Matteo*]. Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension. . . . Once that extension is made, the participant in public debate on an issue of grave public concern would be next in line, ..."

Public employees, as distinguished from public officials, do not ordinarily engage in public debate on matters of grave public concern, *as representatives of government.* Having no portion of the public sovereignty delegated to them, their participation in the "public debates" is and must be as individuals. They therefore are not accorded immunity as to their defamatory statements, since making public statements would in the ordinary case be beyond the "outer perimeter" of their duty as public employees. There is therefore no reciprocal privilege of immunity in the ordinary employee situation that would justify applying the rationale of *Sullivan.*

We interpret *Sullivan* and *Garrison* to establish a Federal rule with regard to criticism of "official conduct" of "public officials", as a distinct rule for those limited cases where official conduct (*i.e.*, execution of sovereign power) by a public official (*i.e.*, one having a duty to exercise sovereign power) is criticized. We do not understand these cases to limit the scope of the freedom of speech and press to report, discuss and comment on public affairs to those limited areas. Thus in *Chagnon* v. *Union Leader Corp.*, 103 N. H. 426, 174 A. 2d 825 (1961), the conditional privilege to criticize a private contractor fulfilling a public contract was recognized by the New Hampshire Court, although Chagnon was not even a public employee. Similar situations could be multiplied without end wherein discussion of public affairs may not involve official conduct of public officials and where libel of individuals is the result. In such instances, where the person libelled does not occupy a public office, and hence has no immunity with respect to his participation in public debate, as was the case here, we submit that neither *Sullivan* nor *Garrison* have application.

There is one further aspect of this case which should remove it from the concern of this Court on constitutional grounds: *the libel complained of, in fact, was not part of any "debate on public issues" which need be uninhibited.* It was an isolated, uncalled-for, and factually unjustified gratuitous slap at Baer

personally, months after he had completed his public employment.

There was in existence no debate as to accounting for funds during Baer's managership. There was no set of facts regarding public money on which the public needed to be informed. There was no suspicion concerning Baer's honesty, and no factual excuse for such suspicion. Rosenblatt *created* the public debate by concocting a false factual premise that more than twice as much public revenue was now being received, and then, using it as a premise, asked his insinuating question, "What happened to all the money last year?"

Since Baer personally handled the cash funds the prior year, from receipt to deposit at the bank, as was public knowledge *and known to Rosenblatt,* the understanding of the readers that the article insinuated that Baer was a thief, was, under the circumstances, almost compelled. Since Rosenblatt is articulate and knows the meaning of the language he uses, it is also an almost compelled conclusion that his use of the language "what happened to all the money last year?" was intended to arouse precisely the suspicion and controversy that it did.

The point we would make is this: the mere fact that a writer couches his libel in terms of a report on public affairs does not *ipso facto* make it a writing on a lawful occasion and therefore privileged. That an unfounded false report creates a public controversy does not excuse it because it becomes part of *that* controversy. There must be *existing* facts which affect an important public interest, and the public interest must *require* the communication of the defamatory matter *before* the lawful occasion for writing arises. (See comment a, Section 598, Restatement of Torts).

> "Where, however, there is merely color of a lawful occasion and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pre-

tense to [write] and circulate defamatory matter, or for some other unlawful purpose, he is liable in the same manner as if such pretense had not been resorted to." *State* v. *Burnham*, 9 N. H. 34, 41-42.

"The use of calculated falsehood, however, would put a different cast on the constitutional question. * * * Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 86 L. ed. 1031, 1035, 62 S. Ct. 766." *Garrison* v. *Louisiana*, *supra*, 13 L. ed. Adv. at 133, 85 S. Ct. at 216.

The petitioner Rosenblatt in this case, as a witness, interpreted his every writing as comment on the official conduct of the County Commissioners, in an overt effort to convince the triers of the fact that he intended no reference to Baer. He patently lied in this effort, as can be discerned at 2 T. 81, 83, 124, 144-146, 184, 169-171, and particularly at 2 T. 174-175. The jurors obviously did not accept these protestations, and their verdict indicates that they were satisfied that this defense was not made out in fact.

We thus have, in this case, the situation of petitioner arguing below that his attack was directed toward public officials, not toward Baer: but arguing in this Court that, having been disbelieved in his defense below, this Court should exonerate him by extending *Sullivan* and *Garrison* to cover Baer. We respectfully suggest that, on the record and the jury verdict returned, this Court should not assume the necessary good faith that is an essential part of the lawful occasion for a privileged writing to exist. This is a case of calculated falsehood published for purposes of personal defamation wholly unrelated to any public debate on any public issue.

III.

There was evidence of malice in the record sufficient to support the implied finding of the jury that malice existed, under the Sullivan test. The trial court's definition of malice and use of "reasonable belief" in defining lawful occasion were not objected to below and, having been waived below are not open for review here.

In the appeal proceedings in the Supreme Court of New Hampshire petitioner admitted that the issue of identification of the plaintiff Baer, and the defamatory implication of the article were properly left for the jury's determination and found against respondent. See Defendant's Brief in Supreme Court of New Hampshire, *p.* 7. Petitioner similarly admitted *arguendo* in that brief on two occasions (*pp.* 24, 32) that the jury in fact did find malice to exist. The Supreme Court of New Hampshire, in its decision being reviewed here, likewise assumed that a finding of malice had been made below, because of the relationship of the verdict ($31,500) to the special damages in evidence ($16,500 or more). See Petitioner's Brief Appendix, p. 52-53. This is proper under the rule that presumes that juries follow instructions in reaching their verdicts. *Dodge* v. *Clair*, 105 N. H. 276, 279, 198 A. 2d 12 (1964); *Richards* v. *Rizzi*, 99 N. H. 327, 110 A. 2d 275. With identification, defamation and malice presumably findable and found below, two questions only appear to remain for disposition: (1) whether there is evidence of malice sufficient to support the presumed finding, and (2) whether the jury instructions defining malice are open for review here.

(1) *There was sufficient evidence of malice.* We outlined in considerable detail in respondent's brief below at pages 29-38 the specific evidence of personal animosity shown in petitioner's prior writings, the circumstance of his having written the libel without investigation of its factual premise, the complete lack of any factual basis for the writing, and the absence of any lawful occasion, as each of these categories show malice. We

have briefly outlined this evidence in our Statement of Facts, *supra*, at pages 9-17. The Supreme Court of New Hampshire in its opinion refers to the same evidence as competent evidence of malice (Petitioner's Brief, Appendix, *pp.* 46-49). We rely on the same evidence as being sufficient, under the same authorities, as set forth in our brief and in the decision below.

This case was not tried relying on a presumption of malice arising solely out of a misstatement made by others and negligently published, as was *Sullivan*. Here we have evidence of sporadic but continuous criticism, over a period of nearly two years, of Baer by Rosenblatt which the jury were entitled to find was unreasonable and unnecessary and some evidence of personal malice. Beyond question the badgering of the articles of January 9, 13, 21 and 27, 1959 under the circumstances was malicious. Certainly the article of June 25, 1959, was unwarranted, and indicates a feeling held by Rosenblatt at least since his February 14 article that Baer was bilking the County. All of these writings have one common theme running through them: isn't there *something* wrong in Baer's management of the Area? Isn't that maybe why he won't answer my questions. Isn't that why he was fired? And, finally; We're getting more than twice as much money now that he has gone: what happened to all of of the money last year?

It is well settled law that the state of feelings of one who wrote a defamatory statement may be demonstrated by other writings of the defendant, and malice may be made out from such writings even if the prior writings, considered separately, do not amount to libel. See WIGMORE ON EVIDENCE (3 Ed). §§403, 404. The prior writings are relevant if they appear to be expressions of ill will, on the rationale that malice at the time of the prior writings indicates the probability of malice at the time charged. In this connection, WIGMORE at p. 372, quotes Parke, B., in *Barrett* v. *Long*, 3 H. L. C. 395, 414:

> "A long practice of libelling plaintiff may show in the most satisfactory manner that the defendant was actuated

by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is."

New Hampshire similarly views such evidence. See *Saladino* v. *Gurdy*, 80 N. H. 211, 212, 116 A. 436, 437:

"Anything defendant has ever said or done with reference to plaintiff may be urged as evidence of malice."

Publishing defamatory material without having any reasonable basis for knowing whether it is true or false provides additional evidence of malice. *State* v. *Burnham*, 9 N. H. 34, 44; *Shackett* v. *Bickford*, 74 N. H. 57, 65 A. 252; 1 HARPER & JAMES, LAW OF TORTS, *s.* 5.27, p. 455; 33 AM. JUR., LIBEL AND SLANDER, *s.* 266, p. 248. The malice arises, not because of negligence, but because of writing for publication without caring about the truth of his statement. ". . . If his statement was untrue and he knew it, or if he made it without belief in its truth, or with a conscious indifference, not caring whether it was true or false, the wickedness of his mind is manifest. . ." *Shackett* v. *Bickford*, *supra*, 74 N. H. at 60.

2. *The trial court's instructions on the definition of malice and his use of "reasonable belief" in defining lawful occasion were proper and were the rule of the trial. No appeal was taken from them. Their supposed deficiencies are urged in this Court for the first time.*

This case was tried in April 1963, after this Court had refused certiorari in the *Chagnon* case and prior to the decisions in *Sullivan* and *Garrison*. It was argued on appeal after *Sullivan* but before *Garrison* was decided here.

Under New Hampshire practice, trial counsel submit requests for instructions to the Court before the jury is charged, are given the opportunity to argue for their instructions and be advised how the Court is to charge, before the charge is given,

and given a further opportunity to except to the failure to charge and to the charge as given after the jury has been instructed but before it retires to deliberate. No appeal lies from a charge as given where no exception was voiced prior to the jury being given the case. See *Downie* v. *Proctor*, 101 N. H. 1, 131 A. 2d 68; *Davis* v. *State*, 94 N. H. 321, 323, 52 A. 2d 793; *Dane* v. *McGregor*, 94 N. H. 294, 298, 52 A. 2d 290; *Beaudin* v. *Company*, 94 N. H. 202, 205-7, 50 A. 2d 77.

The exceptions preserved to the charge are set forth fully at 5 T. 163-169. Petitioner's exceptions were taken by Mr. Nighswander (5 T. 165-167) and Mr. Snow (5 T. 167-169). No exception was taken in any way to the trial court's definition of "malice". Consequently, on the appeal to the Supreme Court of New Hampshire petitioner's brief, in its section dealing with exceptions to the charge, contains no complaint about the definitions used (See Defendant's Brief below, "C. The Charge" *pp.* 13-20), because there was no issue on appeal concerning that aspect of the charge.

It is true that in the following section of the brief, properly arguing the position that there was no evidence of malice below (exception preserved, Reserve Case, *p.* 1, line 9), a makeweight argument on definitions appears, but it is not premised on any exception preserved, and none was. Consequently, we submit that there is no issue here concerning the definition of malice employed in the charge by the trial court and approved on appeal by the Supreme Court of New Hampshire.

Petitioner also, in this court, complains *for the first time* that the trial court in charging on the circumstances of lawful occasion used language of "reasonable belief in its truth". This is an obvious effort to achieve exoneration under *Garrison's* ruling that:

> "The reasonable-belief standard applied by the trial judge is not the same as the reckless disregard for truth standard." 13 L. ed. 2d Adv. 135

In the instant case, however, petitioner affirmatively requested precisely the instruction he now complains of. Defendant's Request No. 16's second sentence is as follows (R.C. p. 23):

> "You will, therefore, find for the defendant even though you find that the inference that was drawn from defendant's questions was untrue and defamatory, if you find that defendant's article was written in good faith, for a justifiable purpose, and *with a belief, founded on reasonable grounds, of its truth*, and unless you find that it was made with actual malice."

The instruction was given by the trial court on *petitioner's request*, and without objection or exception, and consequently no appeal lies from that instruction.

The application of the instruction appears at 5 T. 146, 152, and 156, in the sense proposed by petitioner and *not* as a substitute definition of malice in the form of reckless disregard for the truth. Respondent as plaintiff below asked the same instruction as his Request No. 8. Under such circumstances, where both litigants agree how a matter should be charged, and the trial court adopts the request, the instruction becomes the law of the trial and is binding on the parties on appeal. *Zielinski* v. *Cornwell*, 100 N. H. 34, 39, 118 A. 2d 734.

IV.

The New Hampshire procedure in libel cases of leaving as an issue of fact for the jury, the question whether or not a lawful occasion for a writing existed when the evidence is in conflict is proper under Sullivan and Garrison, and should be approved.

The principal complaint of petitioner throughout this litigation has been that the trial court should have ruled as a matter of law that the writing was privileged, prior to the receipt of evidence, or in any event before the case went to the jury.

Nevertheless, while taking this strong position, petitioner acknowledged that to make out privilege, his own absence of bad faith must be shown (R.C. p. 7, line 7). The position of the parties appear at the outset in colloquy in chambers at 1 T. 17 *et seq*, respondent's position being stated at 20-21.

The question is one of fact whether words, prima facie privileged, were maliciously spoken with intent to defame rather than from proper motives and for a proper purpose. *Moore v. Butler,* 48 N. H. 161, 167-169. Whether an alleged libel is a privileged communication is, under New Hampshire law, a question for the jury, under instructions. *Carpenter* v. *Bailey,* 56 N. H. 283.

Carpenter v. *Bailey* presented the precise point to the New Hampshire Court that the instant petitioner urges. The libel was a petition for the removal of a Navy purchasing agent. Defendant requested that the trial court instruct that such a communication is privileged, but there being evidence of malice in the case, the Court refused, and left the issue to the jury under the same instruction given in this case (Compare 56 N. H. 285 with Charge 5 T. 154). On appeal, the New Hampshire Court said (287, 290):

> "The question as to the publication being privileged was rightly for the jury.
>
> • • •
>
> "Whether the occasion of the publication of this alleged libel was lawful depends upon the good faith and real purpose of the publisher, and therefore must necessarily be settled by the jury. In *Palmer* v. *Concord,* 48 N. H. 217, it was held that a court cannot rule that a communication is privileged, without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith for a justifiable purpose, and with a belief founded on reasonable grounds of its truth."

Palmer v. *Concord*, 48 N. H. 211, sets out this rationale at length at *p.* 217, *reversing* the Trial Court which had ruled that writings critical of the Union Army *were* privileged, and states that such has been the settled law since 9 N. H. The same rule was followed in and approved in *Hutchins* v. *Page*, 75 N. H. 215, 216, 72 A. 689, and again in *Lafferty* v. *Houlihan*, 81 N. H. 67, 121 A. 92, with a full discussion at *pp.* 71-72. *Slocinski* v. *Radwan*, 83 N. H. 501, 144 A. 787, was reversed when the Trial Court ruled that utterances *were* libelous. *Blanchard* v. *Claremont Eagle*, 95 N. H. 375, 63 A. 2d 791 indicates at *p.* 378, that in a "comment" case, it is for the jury to decide whether the comment is "honest opinion expressed for a proper purpose" and whether or not defendant abused a conditionally privileged occasion. This settled law was applied also in *Chagnon* v. *Union Leader Corp.*, 103 N. H. 426, 174 A. 2d 825, a case which involved both false factual defamation and comment.

In footnote 20 of this Court's decision in *Times* v. *Sullivan*, *supra*, 11 L. ed. Adv. 686, at 706, the Court lists several state court decisions as "oft-cited statements of a like rule which has been adopted by a number of state courts"—including New Hampshire by inclusion of citation of the *Chagnon* case, *supra*. Those cases illustrate that the New Hampshire procedure is generally followed in jury cases elsewhere:

Ponder v. *Cobb*, 257 N.C. 281, 126 S.E. 2d 67 (1962) holds that the existence of a lawful occasion is usually for the court but may be a mixed question of law and fact, and that under such circumstances the question of privilege is for the jury. *Lawrence* v. *Fox*, 357 Michigan 134, 97 N.W. 2d 719 (1959) holds similarly that privilege is usually for the Court "unless there are questions relating to the extrinsic circumstances of the occasion requiring the jury's resolution" which were not present in that case but are present here. The Court says, at *p.* 722:

> "Of course, a question may be presented as to whether the extrinsic facts (as distinguished from the words them-

selves) are such as to justify the finding of an occasion of privilege in the first place. * * * But lacking such factual issue as to the occasion, the matter of privilege is for the court."

Stice v. *Beacon Newspaper Corp.*, 185 Kan. 61, 340 P. 2d 296 (1959) states (italics added):

"A privileged publication is one made on an occasion which furnishes a prima facie legal excuse for making it *unless some additional facts are shown* which alter the character of the publication. It comprehends communications made in good faith, without actual malice and with reasonable or probable grounds for believing them to be true."

Bailey v. *Charlestown Mail Assn.*, 126 W. Va. 292, 27 S.E. 2d 837, suggests that good faith requires that "an honest and diligent effort has been made to ascertain the truth of the matter stated. * * * An honest belief [in their truth] presupposed an effort to ascertain the truth, in the absence of which the belief would be groundless". [*Hogan* v. *N. Y. Times*, 313 F. 2d 354 (2 Cir. 1963), accord.]

Salinger v. *Cowles*, 195 Iowa 873, 191 N. W. 167 (1922) holds that criticism "must be legitimate and proper. * * * Those who are vicious and malignant may not conceal attack upon another under a camouflage of qualified privilege."

Snively v. *Record Pub. Co.*, 185 Cal. 565, 198 P. 1 (1921) relies on the principal New Hampshire cases for its adoption of the new rule, and points out that the absence of malice is an essential part of the defense of privilege, which procedurally in that case was cast on defendant. Not so, in this case, the burden of proving malice was placed on respondent (plaintiff below), see 5 T. 162, as in *McLean* v. *Merriman*, 42 S. D. 394, 175 N.W. 878 (1920).

Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P. 2d 150, is the only one of the cases listed in footnote 20 of the

Sullivan decision to take the contrary view, *i.e.*, that the lawful occasion does not depend upon the character of the writing. *Friedell v. Blakely Printing Co.*, 163 Mich. 226, 203 N.W. 974, requires "good faith" as part of privilege but casts the burden of showing improper motive on plaintiff.

We respectfully submit that neither *Sullivan* nor *Garrison* properly should be extended to the point of dictating to the state courts how the issues of lawful occasion, privilege and malice must be handled procedurally as between trial court and jury. The presumptions employed by the Alabama Court emasculated the jury function as finders of the fact in *Sullivan;* trial was by the court in *Garrison.* The instant case involves a jury determination under instructions consistent with the subsequently announced Federal constitutional rules.

We, therefore, respectfully suggest that the petitioner's argument that the "lawful occasion" is a matter which *must* be ruled upon as a matter of law for constitutional reasons is unsound and should be rejected.

CONCLUSION

We prefaced this brief by citing Article 12, 14 and 20 of Part 1 of the Constitution of New Hampshire, and the Seventh and Ninth Amendments to the Constitution of the United States. We believe these provisions indicate that this Court should affirm the decision below.

Those claiming the protection of this Court as persons exercising freedom of speech and press under the First Amendment are not the only persons entitled to constitutional protection. Respondent Baer is constitutionally entitled to his remedy for injury to his character, under Article 14 of our State Constitution. His character or reputation is a part of his person entitled to protection at common law, a settled rule recognized prior to both State and Federal Constitutions, See *Matassa* v. *Bel*, 246 La. 294, 164 So. 2d 332 at 334 (1964); *State* v. *Browne*, 86 N. J. Super 217, 206 A 2d 591 (1965). Being a valuable

right, his reputation cannot be taken from him for public use without compensation, as constitutionally provided in our Article 12. And, he is entitled to the remedy of trial by jury, under our Article 20. The Ninth Amendment to the Constitution of the United States points out that rights enumerated in that Constitution shall not be construed to either deny nor disparage other rights retained by the people—such as Baer's right to a remedy for injury to his reputation—and the Seventh Amendment requires this Court to recognize our jury trial result according to the rules of the common law.

It would seem to us that this Court is without constitutional authority to abridge the constitutional right to recover for injury to character in the exposition of a broader freedom of speech than is constitutionally protected against like abridgment. PEDRICK, FREEDOM OF THE PRESS AND THE LAW OF LIBEL: THE MODERN REVISED TRANSLATION, 49 Cornell L. Q. 581, 588 (Summer 1964). And there are sound reasons for questioning the wisdom of such a course: GOODHART, FREEDOM OF SPEECH AND FREEDOM OF THE PRESS, 1964 Wash. U. L. Q. 248, 250, 251.

New York Times v. *Sullivan*, applied to libel of the official conduct of public officials for the purpose of striking down legal presumptions of bad faith based solely on honest misstatement of fact involves no such encroachment: but if now extended and interpreted as requiring that trial courts *rule as a matter of law* that every writing which contains reference to "matters of public concern" or which is published during a "public debate" is privileged, we are convinced that the result will be increased unjustified defamation with deterioration, rather than improvement, of the public debate or the conduct of public affairs.

This Court, in *Barr* v. *Matteo, supra*, 3 L. ed at 1444, said, in granting immunity for defamation to a public official:

> "And there are of course other sanctions than civil tort suits available to deter the executive official who may

be prone to exercise his functions in an unworthy and irresponsible manner."

There is *no* substitute for libel, however, to deter the writer or publisher who similarly abuses freedom of the press in an unworthy and irresponsible manner, as did the petitioner in this case. (See Pedrick, *op. cit supra.*, 602)

Finally, if it is constitutional error for judges (both State and Federal) to determine as law that writings are libellous, by the same logic it is error for them to determine that writings are privileged as a matter of law, where there are issues of fact raised as to the good faith, malice, or other extrinsic facts upon which privilege is properly predicated. If *Sullivan* is so interpreted we will have made a complete cycle back to the trial of *John Peter Zenger,* 17 Howell's St. Tr. 675 (1735), which evolved the basic American approach to libel which avoids such dangerous precepts and allows the jury to determine the factual issues without interference from the governmental authority. Whether lawful occasion exists, whether a publication is made in good faith for proper purposes, and with or without malice, were jury issues in this case.

The jury verdict should not be disturbed. The decision of the Supreme Court of New Hampshire should be affirmed.

We desire to be heard orally.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 38

ALFRED D. ROSENBLATT,

Petitioner,

—VS.—

FRANK P. BAER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Note, *Constitutional Law—Freedom of the Press—Libel—State Law Allowing Libel by Public Official Without Proof of Malice Held Unconstitutional*, 42 Tex. L. Rev. 1080 (1964) 17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 38

ALFRED D. ROSENBLATT,

Petitioner,

—VS.—

FRANK P. BAER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE**

The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in the above-entitled case.

The Union is a forty-five year old private, non-partisan organization engaged in defending the Bill of Rights, with special emphasis upon the First Amendment. The ACLU appeared as *amicus curiae* in the landmark case of *New*

* This motion is filed because the Respondent has denied consent. The letter of denial, and Petitioner's letter of consent, have been filed with the Clerk of the Court.

York Times v. *Sullivan*, 376 U. S. 254 (1964), which set down the constitutional boundaries within which state libel law must be confined in suits for damages initiated by government officers. The position advocated by the Union was adopted by a majority of the Court.

The case at bar presents one question left open by the *New York Times* case, namely, the category of public officials to which its rule applies. The plaintiff in *New York Times* was an elected official of the City of Montgomery, Alabama; the plaintiff here held a non-elective post as the manager of a publicly owned ski area. It is the ACLU's view that the distinction is constitutionally inconsequential because the comment claimed to be libelous in both cases concerned matters of public affairs relevant to the performance of official duties.

We believe that the exposition of the views set forth in the attached brief will be of substantial assistance to the Court.

Respecfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of The American Civil Liberties Union

The interest of *amicus* is set forth in the preceding motion.

Statement of the Case

This libel action was brought by Frank P. Baer, the former supervisor of the Belknap Recreation Area at Gilford, New Hampshire, based on a column which appeared in the *Laconia Evening Citizen* on January 29, 1960.

Since 1950, Baer had been employed by the Belknap County Commissioners as supervisor of the county-owned Belknap Recreation Area at an annual salary of $8,000 under a written agreement which required that he

> "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area (par. 5); transmit all funds accruing from said recreational area to said county commissioners (par. 6); carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same (par. 7)." *Baer* v. *Rosenblatt*, 106 N. H. 26, 203 A. 2d 773, 776 (1964).

For some time the operation of the Belknap Recreation Area had been a matter of public controversy in the area. Beginning in December, 1958, the petitioner, a local businessman and contributor of an unpaid column in the *Laconia Evening Citizen* entitled "Out of My Head", wrote a number of columns emphasizing the squalid and rundown condition of the area (Def. Ex. 25, December 16, 1958) and urging that the County Commissioners make needed capital improvements in order to make the area more attractive for large numbers of winter tourists and skiers and thus benefit the entire area economically (Def. Ex. 24, December 11, 1958). In one of his columns, the petitioner emphasized that "This please is NOT criticism of Fritzie as manager. Think that man one of greatest 'promoters' ever knew, but poor guy's hands hogtied by complete lack of capital for making real improvements" (Def. Ex. 25, December 16, 1958). This controversy finally resulted in legislation transferring control of the area from the County Commissioners to a newly established five-man commission. N. H. Laws (1959), ch. 399, approved June 15, 1959.

Shortly after the adoption of the legislation, Baer's contract as supervisor of the area was terminated effective July 10, 1959. In September of 1959, the new commission assumed control of the area. Dana S. Beane, Jr., was elected as first Chairman and a new manager, Warren Warner, was employed to succeed the respondent as supervisor of the area.

On January 29, 1960, the petitioner wrote the following column relative to the operations of the area since being placed under the control of the new commission:

> "Been doing a little listening and checking at Belknap Recreational Area and am thunderstruck by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent better than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following questions:
>
> What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results." 203 A. 2d at 776.

On March 9, 1960, respondent brought suit for libel alleging that, since he had been supervisor of the Area

during the previous years referred to in petitioner's column, the column could be and was understood to mean

> " 'that the difference in the net cash results of the income of said Area was due because the plaintiff has committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use', and that 'said false, scandalous, malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule.' " 203 A. 2d 773, 776.

At the trial in April of 1963, almost a year prior to the decision of this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), the petitioner pleaded the truth and that his criticisms relative to the operation of the Belknap Mountain Recreation Area by the respondent and the Belknap County Commission were privileged in the public interest. On April 17, 1963, the jury returned a verdict of $31,500 in favor of the respondent, from which an appeal was taken to the Supreme Court of New Hampshire which affirmed the judgment of the trial court. *Baer* v. *Rosenblatt,* 106 N. H. 26, 203 A. 2d 773 (1964).

ARGUMENT

I.

The instructions of the trial court, authorizing the recovery of damages based on findings that defendant's charges were not "based on reasonable grounds" or that they were published with "ill will, evil motive, intention to injure, or a wanton or reckless disregard of the rights of others", are inconsistent with the decisions of this Court in *New York Times Co.* v. *Sullivan* and *Garrison* v. *Louisiana*.

The trial court instructed the jury that it was entitled "to find that the public had a right to be informed about any difficulties or discrepancies in income or thieving at this public area." It termed such matters "in the public domain", and "public property", and stated that the petitioner's charges, even if untrue, would consequently be conditionally privileged. However, the jury was also instructed that the defense of privilege would be inapplicable unless the petitioner also proved that his charges were "based on reasonable grounds." The court further charged the jury that "It is not enough to show that the defendant actually believed the source of his information to be true"; that "such belief must be founded on reasonable grounds that would satisfy the ordinary man of average prudence."

However, this restricted privilege could not protect the petitioner if the jury found "actual malice", which the trial court defined as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others."

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), this Court held the First Amendment to prohibit a public official "from recovering damages for a defamatory falsehood" unless he shows, "with the convincing clarity which the constitutional standard demands", that the statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. at 279-80, 285-86.

The Supreme Court of New Hampshire found no conflict between the instructions of the trial court on malice and privilege and the constitutional principles which were enunciated for the first time by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).[1] However, as this Court makes emphatically clear in *Garrison* v. *Louisiana,* 379 U. S. 64, 79 (1964), the New Hampshire Supreme Court's approval of the jury charge here does not follow

[1] It is clear that the petitioner is not precluded from raising the new constitutional principles of the *New York Times* case by his failure to raise them in the trial court in April, 1963, almost a year prior to their enunciation by this Court. As this Court has repeatedly emphasized, a waiver of constitutional rights may be found only where there has been "an intentional relinquishment or abandonment of a known right or privelege," *Fay* v. *Noia,* 372 U. S. 391, 439 (1963) and "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson* v. *Zerbst,* 304 U. S. 458, at 464 (1938). Moreover, this Court has repeatedly held that when a fundamental change of law occurs between the trial of a case and the appeal, it is the duty of the appellate court to apply the law as interpreted by the later decision, even though not raised in the lower court. See, e.g., *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch) 103 (1801); *Vanderbark* v. *Owen-Illinois Glass Co.,* 311 U. S. 538 (1941); *Hormel* v. *Helvering,* 312 U. S. 552 (1941); *Uebersee Finanz-Korporation, A.G.* v. *McGrath,* 343 U. S. 205, 212-13 (1952); cf. *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964); *Linkletter* v. *Walker,* —— U. S. ——, 14 L. ed. 2d 601 (1965); *contra, Curtis Publishing Co.* v. *Butts,* —— F. 2d —— (5th Cir., decided July 16, 1965) holding the constitutional principles of the *Times* case to have been waived by the failure to raise them at the trial.

the *New York Times* test. In *Garrison,* the principles of the *New York Times* case were held to require a reversal of a criminal libel conviction based upon findings, which were virtually identical to the instructions in the present case, that Garrison's charges were published with "hatred, ill will or enmity or a wanton desire to injure", and alternatively, that the charges were "not made in a reasonable belief of their truth." As this Court noted, "[t]he reasonable-belief standard is not the same as the reckless disregard of truth standard." 379 U. S. 79. See also *Henry* v. *Pearson,* 380 U. S. 356 (1965).

Unless the respondent, at the time of his employment by the Belknap County Commissioners, was not a "public official" within the meaning of *New York Times Co.* v. *Sullivan* and *Garrison* v. *Louisiana,* it is clear that a reversal of the judgment below is required.

II.

The constitutional principles of *New York Times Co.* v. *Sullivan* are applicable to charges of mismanagement against the supervisor of a publicly-owned recreation area.

Although in *New York Times,* this Court made no attempt to determine "how far down into the lower ranks of government employees the public official designation would extend for purposes of this rule",[2] it is clear that the respondent, as supervisor of the publicly-owned Belknap Recreation Area, was a "public official" whose activities

[2] 376 U. S. at 283, footnote 23.

while in office were subject to constitutionally protected scrutiny and criticism under the *Times* case.

For almost ten years prior to the publication, respondent Baer had been employed by Belknap County under the direction of the three county commissioners to supervise and operate the large Belknap Mountain Recreation Area outside Gilford, New Hampshire. As supervisor of the area, Baer was paid an annual salary of $8,000 from public funds.

In this capacity, Baer was charged with the overall management and supervision of the extensive recreation facilities, the employment of all personnel and the approval of all purchases and expenditures for the area. Nor were the financial operations of the area of minor importance. During the four winter months beginning December, 1958, when the area was still under respondent's supervision, the area had gross receipts of more than $125,000.

For more than a year prior to publication of the allegedly defamatory column, the question of the proper management and development of the Belknap Recreation Area had been the subject of an extended and sometimes heated public controversy in Gilford and Belknap County. In June of 1959 this controversy resulted in the enactment of legislation which removed the Recreation Area from the control of the three-man county commission and placed it under the supervision of a newly-created five-man commission. N. H. Laws 1959, ch. 399, approved June 15, 1959. The services of the respondent were terminated and the commission employed a new supervisor to replace him.

It was in this context that the petitioner wrote the column in which he attempted to inform the people of

Gilford and Belknap County concerning the operations of the publicly-owned Belknap Recreation Area. The operation of the Belknap Recreation Area was public business and involved large expenditures of public funds. The public had every right to be fully informed concerning every aspect of these operations, both past and present.[3]

The "public official" rule of the *New York Times* case is not a rigid abstraction which is to be applied without regard to the great purposes of free speech in a free society which are secured by the First Amendment. These purposes recognize, as did the framers, that public discussion of the affairs of government is both a political right and duty, which must be preserved inviolate to the end that government will be responsive to the will of the peo-

[3] This Court has held the constitutional principles of the *New York Times* case to be applicable in libel cases brought by officials whose positions and responsibilities were of no greater public importance than those of respondent. Thus, in *Henry* v. *Pearson*, 380 U.S. 356 (1965), these principles were held to require the reversal of a libel suit brought against Aaron Henry by a lawyer whose only public employment was as a part-time county attorney of Coahoma County, Mississippi, based on Henry's charges that his arrest for disturbing the peace was part of a "diabolical plot". In the companion case, *Henry* v. *Collins*, 380 U. S. 356 (1965), a suit brought by the Chief of Police of Clarksdale, Mississippi, was also reversed. Similarly, the principles of the *Times* case were held to require reversal of a criminal libel conviction based on a publication which had charged the district attorney of Iberia Parish, Louisiana, with having knowingly used perjured testimony to obtain a conviction. *Moity* v. *Louisiana*, 379 U. S. 201 (1964). And see the dissenting opinion of Judge Richard Rives in *Curtis Publishing Co.* v. *Butts*, —— F. 2d —— (5th Cir., decided July 16, 1965), finding the principles of the *New York Times* case to be applicable to a libel suit brought by the athletic director of a state university who was alleged to have fixed a college football game; and *Schneph* v. *New York Times Co.*, 252 N. Y. S. 2d 934 (1964), in which a libel suit brought by the "principal attorney and chief of the Penalties Division of the Office of Corporation Counsel of the City of New York", was dismissed under the principles of the *Times* case.

ple. *Whitney* v. *California,* 275 U. S. 357, 275-76 (1927) (concurring opinion of Mr. Justice Brandeis); *Stromberg* v. *California,* 283 U. S. 359 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937). Thus, as Mr. Justice Brennan emphasized in the *Garrison* case:

> "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation . . ." 379 U. S. 77.

This paramount public interest in a free flow of information extends to comment on all levels of governmental operations, and includes the right to discuss freely and to criticise the activities of all employees of government and persons in public service, whether such persons happen to be elected or appointed.[4] Mr. Justice Black has concisely summarized the meaning of the constitutional privilege:

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[4] Even prior to the First Amendment, the rights of freedom of speech and of the press were understood as encompassing the right to criticize men at all levels of government service. As Junius emphasized in his famous *Letters* "With regard to strictures upon the character of men in office, [and] the measures of government . . . a considerable latitude must be allowed in discussion of public affairs, or the liberty of the press will be of no benefit to society." *Letters of Junius,* quoted in Storey, *Commentaries on The Constitution* 1884, footnote 3 (2d ed. 1851). "The First Amendment was written by men to whom Wilkes and Junius were household words." Chafee, *Free Speech in The United States* 21 (1941). The broad scope of the rights of freedom of speech and of the press was also emphasized by the Continental Congress in its letter to the inhabitants of Quebec (October 26, 1774) discussing the "five great rights": "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elected or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaude or to criticize the way public employees do their jobs, from the least to the most important." *Barr* v. *Matteo,* 360 U. S. 564, 577 (1959) (concurring opinion).

Thus, the First Amendment protects the right of the public to a free flow of information concerning charges of incompetence, misappropriation of public funds or betrayal of public trust by all public employees, from the highest to the lowest, equally with the more sensational charges of graft or corruption against prominent officials in the higher echelons of government.[5] In the language of

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of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." I *Journal of the Continental Congress,* 104, 108 (1904).

[5] While the constitutional principles of the *New York Times* case extend to all employees of government at all levels of public service, the importance and duties of a particular office remain an important consideration in determining whether a particular matter is germane to an employee's fitness for office or constitutes a purely private libel "totally unrelated to public affairs." As this Court said in *Barr* v. *Matteo,* 360 U. S. 564, 573-74 (1959), "It is not the title of his office, but the duties with which the particular officer . . . is entrusted . . . which must provide the guide . . . " Thus, charges which may be entirely irrelevant as applied to lesser public employees may become relevant as they relate to persons higher up in government, or more sensitively placed.

Thomas Jefferson, only in this manner can the press fulfill its constitutionally assigned function as "the formidable censor of the public functionaries by arraigning them to the tribunal of public opinion." XV Bergh, *The Writings of Thomas Jefferson*, 480, 489 (1907). "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936).

No meaningful distinction can be made between the right of the public to be informed concerning the activities of elected officials and the activities conducted by those in government service whom they employ. Few government programs are administered exclusively by higher officials. Virtually all governmental activities are administered through tiers of public employees to whom duties are delegated and subdelegated. No criticism of such programs can avoid reflection on the lesser officials as well as those at the top. Yet the free flow of information will be restrained and public debate on these issues inhibited if lesser employees and officials can bring libel suits based on such criticisms, even though their superiors may not. The privilege of criticising the principal will be of little benefit if his agents can nevertheless sue for libel.

The deficiencies of such a rule are illustrated in the present case in which the allegedly defamatory column constituted of no more than a critical comparison of the operations of the Belknap Recreation Area under its new management with those in prior years when the Area was controlled by the three-man County Commission. The article reflected upon respondent's reputation only because

it questioned the manner in which the Area was operated during the period in which he was employed by the County as its supervisor and was responsible for its management. Its inevitable effect was also to cast an equal reflection upon the reputations of respondent's superiors, the three County Commissioners. It would be paradoxical indeed to hold the public interest to require the application of the First Amendment principles of the *Times* case in suits brought by the Commissioners, but to withhold constitutional protection for the same statements in a suit brought by respondent arising out of the same publication.

This case likewise demonstrates the impracticability of attempting to distinguish between the right of the press to criticise former officials and the right to criticise those currently in office. Many of the most notorious government scandals have been uncovered only after those responsible were no longer in office. Certainly a public official, by leaving office, does not thereby clothe his conduct while in office with immunity from public scrutiny nor deprive the press of the right to comment thereon. And since government is never static, any meaningful comparison of government operations, such as that attempted by petitioner here, necessarily reflects either on the performance of past or present office holders. Through such comparative appraisals of government operations, the press makes a genuine contribution to public information concerning government affairs and is entitled to constitutional protection under the *Times* case.[6]

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[6] Even a standard encompassing the right of the press to comment without malice only upon the official conduct of persons in government service would leave unprotected many areas of vital public interest. Such a test, rigidly applied, would exclude comments upon candidates for public office, but as this Court rightly noted in

The First Amendment is "much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. . . . It is a declaration of national policy in favor of public discussion of all public questions." Chafee, *Free Speech in the United States* 6 (1941).[7] It has long been recognized that, in interpreting the First Amendment, "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give liberty of the press, as to other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

Garrison, quoting the Supreme Court of Kansas in *Coleman* v. *McLennan*:

> " 'Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office . . . ' " 379 U. S. at 77.

And see *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964), cert. den. 379 U. S. 968 (1965). Similar protection might also be extended to discussion of the activities of persons who seek to influence public opinion by putting themselves forward as participants in public debates and as spokesmen on controversial issues of grave public concern. (See *Associated Press* v. *Walker*, in which the trial court, while recognizing that "the evidence is undisputed that General Walker was a public figure at the time of the riot on the Ole Miss campus," refused to apply the principles of the *New York Times* case and upheld a verdict of $500,000 general damages. This decision was affirmed by the Texas Court of Civil Appeals, 2nd Dist., No. 16624, July 30, 1965.)

[7] Its purpose is to protect "the free publication of matters of public concern, [and] to secure [the] right to a free discussion of public events and public measures. . . . The evils to be prevented were not the censorship of the press merely but any action by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." Cooley, *Constitutional Limitations*, 603-604. And see Meiklejohn, *Free Speech and Its Relationship to Self-Government*, 37-39, 88-89, 94 (1948).

Throughout its decisions, this Court has repeatedly emphasized that "Great secular causes with small ones are guarded by [the First Amendment] . . . and the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins,* 323 U. S. 516, 530-31 (1945). See e.g. *United States* v. *Cruikshank,* 92 U. S. (2 Otto) 542 (1876). "The very idea of a government, republican in form, implies the right . . . to meet peaceably for consultation in respect to public affairs . . . ;" *Whitney* v. *California,* 274 U. S. 357, 375-76 (1927) "public discussion is a political duty;" *Stromberg* v. *California,* 283 U. S. 359, 369 (1931) "full political discussion;" *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, 250 (1936) "an untrammeled press . . . a vital source of public information;" *DeJong* v. *Oregon,* 299 U. S. 353, 366 (1937) "public issues of the day;" *Thornhill* v. *Alabama,* 310 U. S. 88, 101-102 (1940) "all matters of 'public concern' ", "significant issues of the times;" *Bridges* v. *California,* 314 U. S. 252, 268-70 (1941) "arena of public discussion," "public expression [on a] problem of public interest;" *Pennekamp* v. *Florida,* 328 U. S. 331, 346 (1946) "Free discussion of the problems of society is a cardinal principle of Americanism;" "the whole gamut of public affairs is the domain for fearless and critical comment" (concurring opinion of Mr. Justice Frankfurter); *Craig* v. *Harney,* 331 U. S. 367, 375 (1947) "Community events of legitimate interest . . . conduct in the public eye." [8]

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[8] Noel, *Defamation of Public Officers and Candidates,* 49 Col. L. Rev. 875, 877 (1949); Berney, *Libel and the First Amendment—A New Constitutional Privilege,* 51 Va. L. Rev. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* The Supreme Court Review 1964, 191 (1964); Note, *Constitutional Law—Freedom of the Press—Libel—State Law Allowing Libel by Public Official Without Proof of Malice Held Unconstitutional,* 42 Tex. L. Rev. 1080 (1964); Note, *Constitutional Law—First Amendment Requires Qualified Priv-*

As this Court said in *Thornhill* v. *Alabama*:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subse-

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ilege to Punish Defamatory Misstatements About Public Officials, 113 Pa. L. Rev. 284, 285-86 (1964); *The Supreme Court*, 1963 Term, 78 Harv. L. Rev. 201, 203 (1964). The States, in defining the scope of their fair comment rules, have not limited this protection to criticisms of public employees, but have extended the privilege to all matters of public concern and interest. As the Supreme Court of Kansas emphasized in *Coleman* v. *McLennan*, 78 Kan. 711, 98 Pac. 281 (1908), a case on which this Court relied in formulating the constitutional principles of the *Times* case, "This privilege extends to a great variety of subjects, and includes matters of public concern, public men and candidates for office." And see e.g. *Hoeppner* v. *Dunkirk Printing Company*, 254 N. Y. 95, 172 N. E. 139 (1930), criticism of ability of high school football coach; *Clark* v. *McBaine*, 299 Mo. 77, 252 S. W. 428 (1923), statement of reasons for discharge of a law school professor; *Blanchard* v. *Claremont Eagle, Inc.*, 95 N. H. 375, 63 A. 2d 791 (1949), criticism of doctor's refusal to give emergency aid to child; *Krebiozen Research Foundation* v. *Beacon Press*, 334 Mass. 86, 134 N. E. 2d 1, 6 (1956), article attacking effectiveness of Krebiozen as a cure for cancer; *Bearch* v. *Bass*, 88 Me. 521, 34 Atl. 411 (1896), criticism of a public building and its builder; *Griffin* v. *Opinion Publishing Company*, 114 Mont. 502, 138 P. 2d 580 (1943), criticism of proposed settlement of litigant's claim against municipality; *Cohen* v. *Cowles Publishing Company*, 45 Wash. 2d 262, 273 P. 2d 893 (1954), criticism of poor race by a jockey; *Klos* v. *Zahorik*, 113 Iowa 161, 84 N. W. 1046 (1901), condemning solicitation by a Catholic priest of funds to assist Spaniards; *Siemiankowski* v. *Pankiewicz*, 98 N. Y. S. 2d 277 (1950), criticizing methods of a school teacher; *Gattis* v. *Kilgo*, 128 N. C. 402, 38 S. E. 931 (1901), charges of incompetency against the president of a private college; *Flanagan* v. *Nicholson Publishing Company*, 137 La. 588, 68 So. 964 (1915), criticism of local labor leader's support of application of rival city for an exposition; *Cabrey* v. *Cameron*, 55 D. & C. 127 (Pa., 1945), derogatory comments about the friend of a candidate for public office; and *Kennedy* v. *Item Company*, 197 La. 1050, 3 So. 2d 175 (1941), criticism of candidate for admission to bar because of link with allegedly corrupt state government. The Restatement has similarly defined the right of fair comment as extending *to all* "criticism of so much of another's activities which are mat-

> quent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (310 U. S. 88, 101-102).

This clearly was Madison's understanding of the scope of the protection of the First Amendment. In the famous Virginia Resolutions of 1798, protesting the Alien and Sedition Acts, Madison said that the First Amendment guarantees "the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." IV *Elliot's Debates on the Federal Constitution,* p. 554 (1876). "In every state," Madison argued, " . . . the press has exerted a *freedom of canvassing the merits and measures of public men of every description* . . . On this footing the freedom of the press has stood; on this foundation it yet stands . . . " IV *Elliot's Debates, supra* at 570 (emphasis supplied). Madison vigorously opposed the Sedition Act because "it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, *without*

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ters of *public concern*" including "the private conduct or character of another who is engaged in activities of public concern, insofar as his private conduct or character affects his public conduct." Restatement *Torts* §606. And Odgers, *Libel and Slander* 158 (6th ed. 1929), "matters of public interest and general concern"; Newell, *Slander and Libel* §477 (4th ed. 1924), "matters of public interest and general concern."

striking at the right of freely discussing public characters and measures . . . " IV *Elliot's Debates, supra* at 575 (emphasis supplied).

When the First Amendment is read in its historical context and against "the background of profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . ", it is apparent that the great constitutional principles of the *New York Times* case require at the very least the protection of the right of the press to comment freely and without malice on the official conduct of all public officers high or low. Only in this manner can the fundamental freedoms of speech and press be assured the "breathing space" which they need to survive.

CONCLUSION

The judgment of the Supreme Court of New Hampshire should be reversed.

Respectfully submitted,

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August, 1965

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Supreme Court of the United States

No. 38

October Term 1965

Alfred D. Rosenblatt,
Petitioner

vs.

Frank P. Baer,
Respondent

On Writ of Certiorari to the
Supreme Court of New Hampshire

RESPONDENT'S OBJECTION TO MOTION TO FILE BRIEF BY AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

Submitted by,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

No. 38

Alfred D. Rosenblatt,

Petitioner,

vs.

Frank P. Baer,

Respondent

On Writ of Certiorari to the Supreme Court of New Hampshire

RESPONDENT'S OBJECTION TO MOTION TO FILE BRIEF BY AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

NOW COMES the Respondent Frank P. Baer, by counsel, and respectfully objects to the filing of the proposed brief *amicus curiae* offered by the American Civil Liberties Union, for cause:

1. There are no issues in the case which have not been or will not be adequately presented by the parties, Rule 43(3), and none are suggested in the pending motion.

2. The issues in this case depend to a large degree upon the facts as proven in the trial record below. It is patent from a cursory reading of the proposed brief that counsel preparing it have not read that record, and as a result thereof misunderstand and misstate the factual situation on which the issues depend. For example, it is asserted (p. 6) that petitioner pleaded the truth below, whereas in fact petitioner did not claim a defense of truth at the trial (1 T. 24, see also 27, 49-50); no requests for instructions on such a defense were

presented (see R.C. pp. 21-24) and hence the defense of truth was not submitted at all. Again, the factual premise concerning Baer's status as an employee or public official (p. 10) is not based upon the factual record at all, and consequently the argument that is presented is unhelpful in that it assumes a factual situation at variance with the detail of the record.

3. This is private litigation between private litigants, and we object to partisan briefing against our interest by amicus who have insufficient interest in the case to at least read the record before briefing.

Respectfully submitted,

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I certify that on the 13th day of September, 1965, I served a copy of the above objection upon Conrad Snow, Laconia, New Hampshire, counsel for the petitioner and upon Osmond F. Fraenkel, 120 Broadway, New York, New York, counsel for the American Civil Liberties Union, by posting the same in U.S. mail with prepaid Air Mail postage paid.

Stanley M. Brown
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Manchester, New Hampshire

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1965.

Alfred D. Rosenblatt, Petitioner, *v.* Frank P. Baer.	On Writ of Certiorari to the Supreme Court of New Hampshire.

[February 21, 1966.]

Mr. Justice Brennan delivered the opinion of the Court.

A jury in New Hampshire Superior Court awarded respondent damages in this civil libel action based on one of petitioner's columns in the Laconia Evening Citizen. Respondent alleged that the column contained defamatory falsehoods concerning his performance as Supervisor of the Belknap County Recreation Area, a facility owned and operated by Belknap County. In the interval between the trial and the decision of petitioner's appeal by the New Hampshire Supreme Court, we decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254. We there held that under the First and Fourteenth Amendments a State cannot award damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice—that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false. The New Hampshire Supreme Court affirmed the award, finding *New York Times* no bar. 106 N. H. 26, 203 A. 2d 773. We granted certiorari and requested the parties to brief and argue, in addition to the questions presented in the petition for certiorari, the question whether respondent was a "public official" under *New York Times* and under our decision in *Garrison* v. *Louisiana*, 379 U. S. 64. 380 U. S. 941.

The Recreation Area was used principally as a ski resort but also for other recreational activities. Respondent was employed by and directly responsible to the Belknap County Commissioners, three elected officials in charge of the county government. During the 1950's, a public controversy developed over the way respondent and the Commissioners operated the Area; some protested that respondent and the Commissioners had not developed Area's full potential, either as a resort for local residents or as a tourist attraction that might contribute to the county's taxes. The discussion culminated in 1959, when the New Hampshire Legislature enacted a law transferring control of the Area to a special five-man commission.[1] At least in part to give this new regime a fresh start, respondent was discharged.

Petitioner regularly contributed an unpaid column to the Laconia Evening Citizen. In it he frequently commented on political matters. As an outspoken proponent of the change in operations at the Recreation Area, petitioner's views were often sharply stated, and he had indicated disagreement with the actions taken by respondent and the County Commissioners. In January 1960, during the first ski season under the new management, some six months after respondent's discharge, petitioner published the column that respondent alleges libeled him. In relevant part, it reads:

> "Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in procedure; difference in cash income simply fantastic, almost unbelievable.

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[1] N. H. Laws 1959, c. 399.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.

"When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane [Chairman of the new commission] and rest of commission, and Mr. Warner [respondent's replacement as Supervisor] wrought to make such tremendous difference in net cash results?"

I.

The column on its face contains no clearly actionable statement. Although the questions "What happened to all the money last year? and every other year?" could be read to imply peculation, they could also be read, in context, merely to praise the present administration. The only persons mentioned by name are officials of the new regime; no reference is made to respondent, the three elected commissioners, or anyone else who had a part in the administration of the Area during respondent's tenure. Persons familiar with the controversy over the Area might well read it as complimenting the luck or skill of the new management in attracting increased patronage and producing a "tremendous difference in net cash results" despite less favorable snow; indeed, witnesses for petitioner testified that they so read the column.

Respondent offered extrinsic proofs to supply a defamatory meaning. These proofs were that the column greatly exaggerated any improvement under the new regime, and that a large part of the community understood it to say that the asserted improvements were not

explicable by anything the new management had done. Rather, his witnesses testified, they read the column as imputing mismanagement and peculation during respondent's tenure. Respondent urged two theories to support a recovery based on that imputation.

II.

The first was that the jury could award him damages if they found that the column cast suspicion indiscriminately on the small number of persons who comprised the former management group, whether or not it found that the imputation of misconduct was specifically made of and concerning him.[2] This theory of recovery was open to respondent under New Hampshire law; the trial judge explicitly instructed the jury that "an implication of impropriety or a crime to one or some of a small group that casts suspicion on all is actionable."[3] The question is presented, however, whether that theory of recovery is precluded by our holding in *New York Times* that, in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations. 376 U. S., at 290–292.

The plaintiff in *New York Times* was one of the three elected Commissioners of the City of Montgomery, Alabama. His duties included the supervision of the police department. The statements in the advertisement upon which he principally relied as referring to him were that "truckloads of police . . . ringed the Alabama State College campus" after a demonstration on the State Cap-

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[2] The article purports to compare performance of the ski Area under the direction of unnamed persons during the prior year with performance of the Area under the direction of an identified group—a group which includes not only the new manager of the Area, but the new commissioners as well.

[3] See generally Note, 17 U. Miami L. Rev. 519, 523–525 (1963).

itol steps, and that Dr. Martin Luther King had been "arrested . . . seven times." These statements were false in that although the police had been "deployed near the campus," they had not actually "ringed" it and had not gone there in connection with a State Capitol demonstration, and in that Dr. King had been arrested only four times. We held that evidence that Sullivan as Police Commissioner was the supervisory head of the Police Department was constitutionally insufficient to show that the statements about police activity were "of and concerning" him; we rejected as inconsistent with the First and Fourteenth Amendments the proposition followed by the Alabama Supreme Court in the case that "[i]n measuring the performance or deficiencies of . . . groups, praise or criticism is usually attached to the official in complete control of the body," 273 Ala. 656, 674–675, 144 So. 2d 25, 39. To allow the jury to connect the statements with Sullivan on that persumption alone was, in our view, to invite the spectre of prosecutions for libel on government, which the Constitution does not tolerate in any form. 376 U. S., at 273–276, 290–292.[4] We held "that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." 376 U. S., at 292. There must be evidence showing that the attack was read as specifically directed at the plaintiff.

Were the statement at issue in this case an explicit charge that the Commissioners and Baer or the entire area management were corrupt, we assume without deciding that any member of the identified group might recover.[5] The statement itself might be sufficient evi-

[4] See Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 207–210.

[5] Such recovery would, of course, be subject to a showing of actual malice if the individual were a "public official" within the meaning of *New York Times*.

dence that the attack was specifically directed at each individual. Even if a charge and reference were merely implicit, as is alleged here, but a plaintiff could show by extrinsic proofs that the statement referred to him, it would be no defense to a suit by one member of an identifiable group engaged in governmental activity that another was also attacked. These situations are distinguishable from the present case; here, the jury was permitted to infer both defamatory content and reference from the challenged statement itself, although the statement on its face is only an impersonal discussion of government activity. To the extent the trial judge authorized the jury to award respondent a recovery without regard to evidence that the asserted implication of the column was made specifically of and concerning him, we hold that the instruction was erroneous.[6] Here, no explicit charge of peculation was made; no assault on the previous management appears. The jury was permitted to award damages upon a finding merely that respondent was one of a small group acting for an organ of government, only some of whom were implicated, but all of

[6] It might be argued that the charge instructed the jury to award recovery only if it found that the libel was aimed at Mr. Baer or if it found the libel aimed at Mr. Baer, along with a few others. Such a charge might not be objectionable; we do not mean to suggest that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group. However, we cannot read the charge as being so limited. The jury was told

"an implication of impropriety or a crime to one or some of a small group that casts suspicion on all is actionable. It is sufficient if Mr. Baer . . . proves . . . that he was one of a group upon whom *suspicion was cast* . . . ; but Mr. Baer has the burden of showing that the defamation, if you find that there was one, either was directed to him or *could have been* as one of a small group." (Emphasis supplied.)

The latitude allowed the jury to find defamatory reference in this apparently impersonal discussion of government affairs was thus too broad.

whom were tinged with suspicion. In effect, this permitted the jury to find liability merely on the basis of his relationship to the government agency, the operations of which were the subject of discussion. It is plain that the elected Commissioners, also members of that group, would have been barred from suit on this theory under *New York Times*. They would be required to show specific reference. Whether or not respondent was a public official, as a member of the group he bears the same burden.[7] A theory that the column cast indiscriminate suspicion on the members of the group responsible for the conduct of this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient. Since the trial judge's instructions were erroneous in this respect, the judgment must be reversed.

III.

Respondent's second theory, supported by testimony of several witnesses, was that the column was read as referring specifically to him, as the "man in charge" at the Area, personally responsible for its financial affairs. Even accepting respondent's reading, the column manifestly discusses the conduct of operations of government.[8] The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is consti-

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[7] See *Gilberg* v. *Goffi*, 21 A. D. 2d 517, 251 N. Y. S. 2d 823 (1964), aff'd, 260 N. Y. S. 2d 29, 207 N. E. 2d 620 (1965); Note, 114 U. Pa. L. Rev. 241 (1965).

[8] The New Hampshire court fully recognized that this was the subject of the column. It instructed the jury:

"You are entitled, I think, to find that the public had a right to be informed about any difficulties or discrepancies in income or thievery at this public area. It's in the public domain. It's public property . . . . Keep in mind that the public has a right to know how their public affairs are being conducted. . . ."

tutionally irrelevant. The question is squarely presented whether the "public official" designation under *New York Times* applies.

If it does, it is clear that the jury instructions were improper. Under the instructions, the jury was permitted to find that negligent misstatement of fact would defeat petitioner's privilege. That test was rejected in *Garrison*, 379 U. S., at 79, where we said, "The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." The trial court also charged that "[d]efamatory matter which constitutes comment rather than fact is justified if made without malice and represented fair comment on matters of public interest," and defined malice to include "ill will, evil motive, intention to injure . . . ." This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; "[w]e held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." *Garrison*, 379 U. S., at 74.

Turning, then, to the question whether respondent was a "public official" within *New York Times*, we reject at the outset his suggestion that it should be answered by reference to state-law standards. States have developed definitions of "public official" for local administrative purposes, not the purposes of a national constitutional protection.[9] If existing state-law standards reflect the purposes of *New York Times*, this is at best accidental. Our decision in *New York Times*, moreover, draws its force from the constitutional protections afforded free expression. The standards that set the scope of its pri-

[9] See, *e. g.*, Opinion of the Justices, 73 N. H. 621, 62 A. 969 (1906).

ciples cannot therefore be such that "the constitutional limits of free expression in the Nation would vary with state lines." *Pennekamp* v. *Florida*, 328 U. S. 331, 335.[10]

We remarked in *New York Times* that we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U. S., at 283, n. 23. No precise lines need be drawn for the purposes of this case. The motivating force for the decision in *New York Times* was twofold. We expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U. S., at 270. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of gov-

[10] For similar reasons, we reject any suggestion that our references in *New York Times*, 376 U. S., at 282, 283, n. 23, and *Garrison*, 379 U. S., at 74, to *Barr* v. *Matteo*, 360 U. S. 564, mean that we have tied the *New York Times* rule to the rule of official privilege. The public interests protected by the *New York Times* rule are interests in discussion, not retaliation, and our reference to *Barr* should be taken to mean no more than that the scope of the privilege is to be determined by reference to the functions it serves. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 590–591 (1964).

ernment employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[11]

This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present[12] and the *New York Times* malice standards apply.[13]

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[11] Compare, *e. g.*, *Clancy* v. *Daily News Corp.*, 202 Minn. 1, 277 N. W. 264 (1938); *Tanzer* v. *Crowley Publishing Corp.*, 240 App. Div. 203, 268 N. Y. Supp. 620 (1934); *Poleski* v. *Polish Am. Publishing Co.*, 254 Mich. 15, 235 N. W. 841 (1931); 1 Harper & James, Torts § 5.26, pp. 449–450 (1956); Prosser, Torts § 110, p. 815 (3d ed. 1964); Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 896–897, 901–902 (1949); Note, 113 U. Pa. L. Rev. 284, 288 (1964); Note, 18 Vand. L. Rev. 1429, 1445 (1965).

[12] We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern. Cf. *Salinger* v. *Cowles*, 195 Iowa 873, 889, 191 N. W. 167, 173–174 (1922); *Peck* v. *Coos Bay Times Publishing Co.*, 122 Ore. 408, 420–421, 259 P. 307, 311–312 (1927);

[*Footnote 13 on p. 11*]

As respondent framed his case, he may have held such a position. Since *New York Times* had not been decided when his case went to trial, his presentation was not shaped to the "public official" issue. He did, however, seek to show that the article referred particularly to him. His theory was that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations, chargeable with its failures and to be credited with its successes. Thus, to prove the article referred to him, he showed the importance of his role; the same showing, at the least, raises a substantial argument that he was a "public official." [14]

The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his

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Coleman v. *MacLennan*, 78 Kan. 711, 723–724, 98 P. 281, 285–286 (1908); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (C. A. 2d Cir. 1965).

[13] It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

[14] It is not seriously contended, and could not be, that the fact respondent no longer supervised the Area when the column appeared has decisional significance here. To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule. But here the management of the Area was still a matter of lively public interest; propositions for further change were abroad, and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to respondent, referred to his performance of duty as a county employee.

claim outside the *New York Times* rule. Moreover, even if the claim falls within *New York Times*, the record suggests respondent may be able to present a jury question of malice as there defined. Because trial here was had before *New York Times*, we have concluded that we should not foreclose him from attempting retrial of his action. We remark only that, as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official." [15]

The judgment is reversed and the case remanded to the New Hampshire Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK concurs in the result.

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[15] 1 Harper & James, Torts § 5.29 (1956); Prosser, Torts § 110, p. 823 (3d ed. 1964), Restatement, Torts, § 619. Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and it would assure an appellate court the record and findings required for review of constitutional decision. Cf. *Speiser* v. *Randall*, 351 U. S. 513, 525; *New York Times*, 376 U. S., at 285.

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1965.

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[February 21, 1966.]

Mr. Justice Douglas, concurring.

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, we dealt with elected officials.[1] We now have the question as to how far its principles extend or how far down the hierarchy we should go.

The problems presented are considerable ones. Maybe the key man in a hierarchy is the night watchman responsible for thefts of state secrets. Those of us alive in the 1940's and 1950's witnessed the dreadful ordeal of people in the public service being pummelled by those inside and outside government, with charges that were false, abusive, and damaging to the extreme. Many of them, unlike the officials in *New York Times* who ran for election, rarely had opportunity for rejoinder.

Yet if free discussion of public issues is the guide, I see no way to draw lines that exclude the night watchman, the file clerk, the typist, or, for that matter, anyone on the public payroll. And how about those who contract to carry out governmental missions? Some of them are as much in the public domain as any so-called officeholder. And how about the dollar-a-year man,

[1] And cf. *Farmers Union* v. *WDAY*, 360 U. S. 525, holding that a radio station is not liable for defamatory statements made in a speech broadcast over his station under § 315 (a) of the Federal Communications Act of 1934 by a candidate for public office.

whose prototype was publicized in *United States* v. *Mississippi Valley Generating Co.*, 364 U. S. 520?[2] And the industrialists who raise the price of a basic commodity? Are not steel and aluminum in the public domain? And the labor leader who combines trade unionism with bribery and racketeering? Surely the public importance of collective bargaining puts labor as well as management into the public arena so far as the present constitutional issue is concerned.[3]

The Court in *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102, put the issue as follows:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

If the term "public official" were a constitutional term, we would be stuck with it and have to give it content.

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[2] He in fact received no compensation from the Government, but was given $10 per day in lieu of subsistence, plus transportation expenses. See 364 U. S., at 533.

[3] Cf. *Linn* v. *United Plant Guard Workers*, — U. S. —, where the principle of *New York Times Co.* v. *Sullivan*, *supra*, is extended, *via* the path of pre-emption, to the field of labor relations.

But the term is our own; and so long as we are fashioning a rule of free discussion of public issues, I cannot relate it only to those who, by the Court's standard, are deemed to hold public office.

The question in final analysis is the extent to which the Due Process Clause of the Fourteenth Amendment has displaced the libel laws of the States. I do not suppose anyone would have thought in those terms at the time the Amendment was adopted. But constitutional law is not frozen as of a particular moment of time. It was indeed not until 1931 that this Court squarely held that the First Amendment was applicable to the States by reason of the Fourteenth (*Stromberg* v. *California*, 283 U. S. 359, 368–369)—*New York Times* being merely an application and extension of that principle. But since freedom of speech is now the guideline, do state libel laws have any place at all in our constitutional system, at least when it comes to public issues? If freedom of speech is the guide, why is it restricted to speech addressed to the larger public matters and not applicable to speech at the lower levels of science, the humanities, the professions, agriculture, and the like?

In my view the First Amendment would bar Congress from passing any libel law, the Alien and Sedition Act (1 Stat. 596) to the contrary notwithstanding. Some think that due process as applied to the States is a watered-down federal version as respects the guarantees in the Bill of Rights that are incorporated into the Fourteenth Amendment. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476, 501 (separate opinion); *Beauharnais* v. *Illinois*, 343 U. S. 250, 287 (dissenting opinion). That has been the minority view, the majority maintaining that there is no difference. If there is no difference and if I am right in assuming Congress could not consti-

tutionally pass a libel law, then the question is whether a public *issue*, not a public official, is involved.[4]

The case is therefore for me in a different posture than the one discussed by the Court. I would prefer to dismiss the writ as improvidently granted.[5] To facilitate our work,[6] however, I have decided to join Part II of the Court's opinion, as well as MR. JUSTICE BLACK's separate opinion, and to concur in the judgment.

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[4] There is the view that the "most absolute construction of the First Amendment, as applied to the states by the Fourteenth, would permit a line to be drawn between the spurious common law of seditious libel and the genuine common law of civil liability for defamation of private character." Brant, The Bill of Rights: Its Origin and Meaning 502–503 (1965). But that *ipse dixit* overlooks our decisons which, without defining the outer limits, establish that the First Amendment applies to *both*. Compare *New York Times* v. *Sullivan, supra,* with *Garrison* v. *Louisiana,* 379 U. S. 64.

[5] The complaint was drawn and the trial conducted in conformity with the defamation law as it existed prior to *New York Times.* Whether the complaint can be amended to conform to the theory of liability announced in *New York Times* is wholly a matter of state law. See N. H. Rev. Stat. Ann. § 514:9 (1955). Whether there can be a new trial is also wholly a matter of state law. See N. H. Rev. Stat. Ann. § 526:1 (1955). Whether respondent is a "public official" in the *New York Times* sense is not ascertainable from the record. We do not even know whether he took an oath of office. So far as we know, he may have been a hybrid in the nature of an independent contractor. Moreover, the oral argument and the briefs were not squarely addressed to the larger and profoundly important questions stirred by this litigation.

[6] Cf. Mr. Justice Rutledge in *Screws* v. *United States,* 325 U. S. 91, 113, 134.

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[February 21, 1966.]

Mr. Justice Stewart, concurring.

The Constitution does not tolerate actions for libel on government. State defamation laws, therefore, whether civil or criminal, cannot constitutionally be converted into laws against seditious libel. Our decisions in the *New York Times* and *Garrison* cases turned upon that fundamental proposition.[1] What the Court says today seems to me fully consonant with those decisions, and I join the Court's opinion and judgment.

It is a fallacy, however, to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, "important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the

[1] *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisiana*, 379 U. S. 65.

Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

We use misleading euphemisms when we speak of the *New York Times* rule as involving "uninhibited, robust, and wide-open" debate, or "vehement, caustic, and sometimes unpleasantly sharp" criticism.[2] What the *New York Times* rule ultimately protects is defamatory falsehood. No matter how gross the untruth, the *New York Times* rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered "in reckless disregard of the truth."

That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel.[3] The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars.[4] The destruction that defamatory falsehood

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[2] See *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

[3] This is not to say that there do not exist situations where for other reasons state defamation laws may be similarly limited. See *Linn* v. *United Plant Guard Workers*, — U. S. —.

[4] Irving Brant has recently made the point well:

"Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder. They lie within the genuine orbit of the common law, and in the distribution of American sovereignty they fall exclusively within the jurisdiction of the states. The First Amendment further assures their exclusion from the federal domain. The Fourteenth Amendment, by absorbing the First, unquestionably gives the Supreme Court authority to block state use of civil suits as a substitute for laws of seditious libel. But considering the differences in derivation, in purpose, in value to society, and in the natural location of power, there seems to be no compelling constitutional reason to bar private suits. The most absolute construction of the First Amendment, as applied to the states by the Fourteenth, would permit a line to be drawn between the spurious common law of seditious libel and the genuine

can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

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common law of civil liability for defamation of private character. It is the misuse of civil liability that offends the Constitution." Brant, The Bill of Rights (1965), at pp. 502–503.

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1965.

Alfred D. Rosenblatt, Petitioner, *v.* Frank P. Baer. } On Writ of Certiorari to the Supreme Court of New Hampshire.

[February 21, 1966.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring and dissenting.

Respondent Baer managed the financial affairs of a ski recreation center owned and operated by Belknap County, New Hampshire. Petitioner Rosenblatt, an unpaid columnist for a local newspaper, published a column criticizing the past management of the center. Baer thought the column implied dishonest manipulations in his handling of the finances for the center. Charging this he sued Rosenblatt for libel and obtained a verdict for $31,500 which the Supreme Court of New Hampshire affirmed. This Court, relying on *New York Times Co.* v. *Sullivan*, 376 U. S. 254, and *Garrison* v. *Louisiana*, 379 U. S. 64, reverses that judgment and remands to the state court under conditions expressed in its opinion that will allow a new trial and another judgment against Rosenblatt. I concur in the reversal but dissent from leaving the case open for a new trial believing that for reasons stated in the concurring opinions of Mr. Justice Douglas and myself in the *New York Times* and *Garrison* cases a libel judgment against Rosenblatt is forbidden by the First Amendment which the Fourteenth made applicable to the States.

I think the publication here, discussing the way an agent of government does his governmental job, is the very kind that the First Amendment was adopted primarily to protect. The article here sued on as libelous

discusses the use of the public's money to take care of the public's business by a paid agent of the public. Unconditional freedom to criticize the way such public functions are performed is in my judgment necessarily included in the guarantees of the First Amendment. And the right to criticize a public agent engaged in public activities cannot safely, and should not, depend upon whether or not that agent is arbitrarily labeled a "public official." Nor should the right to criticize depend upon how high a position in government a public agent may occupy. Indeed a large percentage of public moneys expended is distributed by local agents handling local funds as the respondent in this case did. To be faithful to the First Amendment's guarantees, this Court should free private critics of public agents from fear of libel judgments for money just as it has freed critics from fear of pains and penalties inflicted by government.

This case illustrates I think what a short and inadequate step this Court took in the *New York Times* case to guard free press and free speech against the grave dangers to the press and the public created by libel actions. Half-million dollar judgments for libel damages like those awarded against the New York Times will not be stopped by requirements that "malice" be found, however that term is defined. Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried. And this Court cannot and should not limit its protection against such press-destroying judgments by reviewing the evidence, findings, and court rulings only on a case-by-case basis. The only sure way to protect speech and press against these threats is to recognize that libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments. I repeat what I said in the *New York Times* case that "An

unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."

Finally, since this case is to be sent back and a new trial may follow, I add one further thought. The Court indicates that in a retrial it will be for the trial judge "in the first instance" to decide whether respondent is a "public official." Statements like this have a way of growing and I fear that the words "in the first instance" will soon be forgotten. When that happens the rule will be that the Federal Constitution forbids States to let juries decide essentially jury questions in libel cases. After a long fight in England Fox's Libel Law of 1792 was passed and it provided that juries should be the judges of both the law and the facts in libel cases. This was heralded by all lovers of freedom of speech and press as a victory for freedom. This rule was particularly approved in this country where in 1735 John Peter Zenger was prosecuted in a highly publicized trial for criticizing the government of New York. In that case the Chief Justice of the Province of New York got rid of two lawyers who dared defend Zenger by disbarring them. The lawyer who finally defended Zenger, Andrew Hamilton, won imperishable fame in this country by his boldness in telling the jury that they, not the judge, had the right to say whether or not the defendant was guilty. Zenger was acquitted. 17 How. State Tr. 675. Many of the States familiar with this oppressive practice of denying the jury and granting the judge power to determine the guilt of a defendant in libel cases wrote in their constitutions special provisions to protect the right to trial by jury in such cases. I regret to see the Court take a single step in the direction of holding that a judge rather than the jury is to have the determination of any fact in libel cases. Compare *Jackson* v. *Denno*, 378 U. S. 368.

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[February 21, 1966.]

Mr. Justice Harlan, concurring in part and dissenting in part.

I agree with the Court's opinion except for Part II, in which a section of the trial court's charge is characterized as depending upon a "theory" of "impersonal" libel, which we held constitutionally impermissible in *New York Times Co.* v. *Sullivan*, 376 U. S. 254.

In *New York Times*, in addition to establishing a constitutional standard governing actions for defamation of public officials, we went on to examine the evidence in that particular case. We found that "it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent." 376 U. S., at 288. The statements in question, in general terms, attributed misconduct to the police of Montgomery, Alabama, during civil rights activities. The plaintiff in the libel suit, the Commissioner of Public Affairs, pressed his action not on the theory that the statements referred to him, but instead "solely on the unsupported assumption that, because of his official position," the statements must be taken as indicating that he had been involved in the misconduct. 376 U. S., at 289. The Supreme Court of Alabama held that "[i]n measuring the performance or deficiencies of . . . groups [such as the police], praise or criticism is usually attached to the official in complete control of the body," 273 Ala., 656, at 674–675, 144 So. 2d 25, at 39, and allowed the action by the Commissioner.

In setting aside the State judgment we noted that this proposition had "disquieting implications for criticism of governmental conduct," 376 U. S., at 291, for it permitted any general statement criticizing some governmental activity to be transmuted into a cause of action for personal libel by the official in charge of that activity. We stated that the liberty of expression embodied in the Fourteenth Amendment forbade a State from permitting "an otherwise impersonal attack on governmental operations" to be used as the basis of "a libel of an official responsible for those operations." 376 U. S., at 292.

This salutary principle has been applied, I believe incorrectly, to the facts of this case. It is true that, on its face, the alleged libel here seems to discuss only the conduct of governmental operations, *viz.*, the comparative improvement in the management of the ski area. However, the theory on which respondent based his claim is that the rhetorical question, "What happened to all the money last year? and every other year?," was read as accusing him of peculation or culpable mismanagement. The trial court and the Supreme Court of New Hampshire, as well as this Court, have found this a permissible reading of the newspaper article.

The charge of the trial court did not leave the jury free to convert an "impersonal" into a "personal" libel. The court merely instructed the jury that *if* it interpreted the article as an accusation of misconduct the jury could find for the plaintiff if either he alone was found to be libeled, or he was one of a small group of persons so libeled.* This is conventional tort law. "[I]f the group is small enough numerically or sufficiently restricted geographically so that people reasonably think the defama-

*The trial judge charged the jury as follows:

"An insinuation of a crime is actionable as a positive assertion of the meaning is reasonably plain and clear, and the putting of the words in the form of a question does not change the liability of

tory utterance was directed to or intended to include the plaintiff, there may be a recovery." 1 Harper and James, Torts, § 5.7, at 367 (1956). See also Prosser, Torts, § 106, at 767–768 (1964); Riesman, Democracy and Defamation: Control of Group Libel, 42 Col. L. Rev. 727, 759–760 (1942). The Restatement of Torts, § 564, comment *b* (1938), includes this aspect of defamation in language very similar to that of the charge in this case:

> "The size of the class may be so small as to indicate that the plaintiff is the person intended or at least to cast such grave suspicion upon him as to be defamatory of him. Thus, a statement that all members of a school board or a city council are corrupt is sufficiently definite to constitute a defamatory publication of each member thereof. If, however, the group or class disparaged is a large one, some particular circumstances must point to the plaintiff as the person defamed. Thus, a statement that all lawyers are dishonest or that all ministers are liars is not defamatory of any particular lawyer or min-

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the defendant if the form and sense of the question is defamatory or derogatory. Now, an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable. It is sufficient if Mr. Baer, the plaintiff here, proves on the balance of probabilities by his evidence that he was one of a group upon whom suspicion was cast, and the fact that others in this group might also have been libeled is not a defense; but Mr. Baer has the burden of showing that the defamation, if you find that there was one, either was directed to him or could have been as one of a small group." R. 148–149.

. . . . . .

"Now, as to any part of the article which you, if you do, find defamatory, and that Mr. Baer was intended, or he with a few others was intended, he and a small group, if you find that it was derogatory of him and charged him with a crime, held him up to scorn and ridicule, that he was the fellow, either singly or in a small group, then you can go on to consider—and you should—whether the publication was privileged or justified . . . ." R. 151–152.

ister unless the surrounding circumstances indicate that he was the person intended."

This and the trial court's formulation can scarcely be thought too indefinite, for they reflect standards successfully applied over the years in numerous state cases. See, *e. g., Gross* v. *Cantor,* 270 N. Y. 93; cases cited in Harper and James, *supra,* § 5.7, at 367; and Prosser, *supra,* § 106, at 767–768. The rule is an eminently sound one.

As to the facts at hand, it seems to be agreed—apart of course from the public-official "malice" rule which would apply in any event—that if the article in question is read by the jury as an accusation of wrongdoing by Baer, he has a good cause of action in libel. I see no reason why that cause of action should fail if the jury finds that the article was read as accusing the three Commissioners along with Baer. This is a very different case from *New York Times,* where the alleged libel concerned not an identified small group responsible for the running of a particular public enterprise, but a criticism of "the police" generally in the discharge of their duties. It seems manifest that in instructing the jury as to a "small group," the trial judge was not allowing the plaintiff to transform impersonal governmental criticism into an individual cause of action, but was simply referring to this traditional tort doctrine that more than one person can be libeled by the same statement. I cannot understand why a statement which a jury is permitted to read as meaning "*A* is a thief" should become absolutely privileged if it is read as meaning "*A, B, C,* and *D* are thieves."

Without receding in any way from our ruling in *New York Times* that impersonal criticism of government cannot be made a basis for a libel action by an official who heads the branch or agency involved, I dissent from the Court's conclusion that this is such a case. In all other respects I join the Court's opinion.

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[February 21, 1966.]

Mr. Justice Fortas, dissenting.

I would vacate the writ in this case as improvidently granted. The trial below occurred before this Court's decision in *New York Times* v. *Sullivan*, 376 U. S. 254. As a result, the factual record in this case was not shaped in light of the principles announced in *New York Times*. Particularly in this type of case it is important to observe the practice of relating our decisions to factual records. They serve to guide our judgment and to help us measure theory against the sharp outlines of reality. Especially where our decision furnishes a necessarily Procrustean bed for state law, I think, with all respect, that we should insist upon a relevant factual record. A subsequent trial may conceivably help respondent, but it will be too late to be of assistance to us.